

Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field

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I. INTRODUCTION

On a Findlaw message board, Clare Smith posted the following plea for help following a Kentucky divorce-related mediation she thought the mediator had handled poorly.² In this short posting, dated February 15, 2004, she identified problems dealing with at least two core values of mediation—impartiality and party self-determination.³ Her posting reflects badly on

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² Posting of Clare Smith to FindLaw for Legal Professionals, General Discussion, <http://boards.lp.findlaw.com/cgi-bin/WebX.fcgi?14@206.LLVGbGGvRSV%5E0@.ef0688b/1571> (Feb. 15, 2004, 17:49 EST). The posting in its entirety, with its spelling, grammar, and punctuation errors, appears in Appendix A. In the excerpt above, I have corrected some of those errors, for easier reading, without notation.

³ Confidentiality is the third core value of mediation typically identified. See, e.g., Carol L. Izumi & Homer C. La Rue, *Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RESOL. 67, 86. The authors argue that:

mediators, referring courts, attorneys who represent parties in the process, and the process itself. Do we, as the mediation community, owe her more than just the opportunity to plea for help on an internet website? She wrote:

What exactly is entailed in making a complaint on an unethical mediator?

... The mediator held an obvious bias and was allowed to create the divorce property agreement.

... The only thing concrete is that the agreement, which I was coerced to sign, was written with "his interpretation" of marital assets. In one such instance he wrote a value as being 6K when the actual value was 60K. For what it's worth, during the mediation, the mediator made comments to my attorney including, "She's young enough to get married before the alimony runs out, don't you think so?" as a reason for me being okay with what was presented! And also: "[S]ure, she's pretty enough to get married again in 4 years." I refused to sign several times, my attorney then began yelling at me to "shut-up and sign the damn thing." I wasn't allowed to leave until it was signed. ... The words, "NO I can't sign this," fell on deaf ears. I was so unfamiliar with the process of it all and what it meant and what the outcome entailed.

... Maybe a complaint won't help me. But it might help someone else. How do I distinguish myself seriously to the parties that handle such things? If other attorneys are reviewing and investigating, why would that be fair? Do I have to offer proof and cite law of ethics in a complaint for it to be valid? What exactly can I prove?

....

Clare

PS - ... I do not know how this mediator was chosen, likely by the ex's attorney.

the three core values of self-determination, mediator neutrality, and confidentiality are interdependent qualities that define mediation as it was originally envisioned and gave rise to the promise of mediation as a distinct alternative to adjudication. The values are integral to the legitimacy of mediation as a consensual, flexible, creative, party-driven process to resolve disputes.

A day later, Martin Cassman⁴ responded, saying that Clare should contact the bar association “of the state in which the mediator was licensed and/or the court from which he receives assignments.” He advised her to file a complaint. This advice assumes that the mediator was also a licensed attorney. He next analyzed possible tort claims against her attorney. Then he dismissed her perspective of the situation as unbelievable because she had not “report[ed] this to the police, did not sue civilly, did not seek a legal malpractice attorney or take any steps to investigate the timely vindication of substantial rights which existed separately . . . from the divorce action” He concluded by saying: “In sum, with no proof of misconduct [and not having filed] a police report . . . it would be a miscarriage of justice for such an allegation to be given anything other than short shrift.” He suggested that this tough love approach to her complaint would help her fashion one with greater credibility if she decided to file one with the bar.

What neither Clare nor Martin realized, however, was that at the time of the mediation, and even at the time of her posting, Kentucky had no standards of ethics governing mediators.⁵ It had no formalized training program for mediators or other barriers to entry to the field. It did not attempt to discover if prospective mediators had good moral character. It had no licensing, registration, certification, or recertification process. It did not require mediators to get continuing mediator education. It had no mediation confidentiality statute. It had no immunity statute for mediators. It had no ethics advisory panel that could help mediators resolve the inevitable ethical

⁴ Mr. Cassman does not have a listing in the Martindale-Hubbell lawyer directory. See Lawyer Locator Basic Search, <http://www.martindale.com/xp/Martindale/home.xml> (last visited Mar. 2, 2006). A Google search using his name as the search term does not show him associated with any law firm. He does not maintain a return e-mail address or website reference on Findlaw. Posting of Martin Cassman to FindLaw, General Discussion, <http://boards.lp.findlaw.com/cgi-bin/WebX.fcgi?14@206.LLVGbGGvRSV%5E0@.ef0688b/1571> (Feb. 16, 2004, 13:28 EST). Thus, Clare’s posting raises the prospect of a party who has no process available to file a complaint against the mediator, no lawyer interested in pursuing a malpractice claim on her behalf against her former lawyer or the mediator, and a non-lawyer giving her advice about both options. Even if Mr. Cassman is a lawyer, it does not appear he is licensed to practice law in Kentucky. See Welcome to the Kentucky Bar Association, Lawyer Locator, <http://www.kybar.org/Default.aspx?tabid=26> (last visited Mar. 2, 2006). Mr. Cassman’s full response to Clare’s posting appears in Appendix B.

⁵ See generally Vanessa Mitchell, Note, *Mediation in Kentucky: Where Do We Go From Here?*, 87 KY. L.J. 463 (1998–99) (arguing that Kentucky needs a statewide rule for mediation, giving a history of efforts to adopt a mediation rule in the state, suggesting possible approaches to a rule, and surveying the mediation court referral rules in North Carolina, Delaware, and Tennessee).

dilemmas they face. It had no easily accessible analysis of or guidelines on the unauthorized practice of law in the context of mediation.

Instead, in 2004, Kentucky had an obscure statute authorizing and encouraging courts and state agencies to refer disputing parties to mediation.⁶ Another statute defined mediation as: “[A] nonadversarial process in which a neutral third party encourages and helps disputing parties reach a mutually acceptable agreement. Recommendations of mediators are not binding on the parties unless the parties enter into a settlement agreement incorporating the recommendations.”⁷

Since February 2004, when Clare posted her message, the regulatory situation in Kentucky has changed. In April 2005, the Supreme Court of Kentucky approved an amendment to its rules of administrative procedure suggesting “minimum standards for training, experience, education, and ethical conduct” for mediators practicing in court-connected mediation situations.⁸ But, the ethical guidelines are just that. They are not mandatory

⁶ KY. REV. STAT. ANN. § 454.011 (LexisNexis 2004), originally passed in 1998. Recently, the new ADR Section of the Kentucky Bar Association gave its first presentation at the annual bar association conference. Several mediators familiar with the state law called it the “least known law in Kentucky.” See KY. BAR ASS’N ADR SECTION, ALTERNATIVE DISPUTE RESOLUTION: THINKING OUTSIDE THE COURTHOUSE (2005 KBA Annual Convention June 9, 2005). In 2000, the Supreme Court of Kentucky adopted Model Mediation Rules that encouraged courts throughout the state to refer cases to mediation. See Kentucky Court of Justice, Alternative Dispute Resolution Background in Kentucky, http://www.kycourts.net/AOC/MAFCS/MAFCS_MSBackground.shtml (last visited Mar. 2, 2006); MODEL MEDIATION RULES (Kentucky Court of Justice (adopted Feb. 1, 2000)), available at http://www.kycourts.net/AOC/MAFCS/MAFCS_MSRules.shtml.

⁷ KY. REV. STAT. ANN. § 446.010(40) (LexisNexis Supp. 2004).

⁸ In re: Amendment to the Rules of Administrative Procedure AP Part XII. Mediation Guidelines for Court of Justice Mediators, Order 2005-02 (Ky. Apr. 15, 2005), available at http://www.kycourts.net/AOC/MAFCS/AOC_MAFCS.shtml; see CTR. FOR DISPUTE SETTLEMENT, THE INST. OF JUDICIAL ADMIN., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS iv (1998) [hereinafter NATIONAL STANDARDS], available at <http://www.caadr.org/studies/Nationstd.htm> (defining court-connected mediation programs as “any program or service, including a service provided by an individual, to which a court refers cases on a voluntary or mandatory basis, including any program or service operated by the court”); see also Policy Consensus Initiative, Directory of DR Programs, <http://www.policyconsensus.org/directory/alldirectory.php> (providing an online list and description of the dispute resolution programs established by state courts and agencies) (last visited Mar. 2, 2006). See generally Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93 (2002) (describing the public’s enhanced confidence in the quality and integrity of the justice system and encouraging the development of more quality court-connected mediation

and they do not apply to all mediators, even on a voluntary basis.⁹ The state still has no grievance system by which dissatisfied parties can describe their perceptions of a mediation gone wrong, feel genuinely heard and validated, and know that a carefully chosen group of people will conduct an unbiased investigation of the complaint and provide a remedy for both the grieving party¹⁰ and accused mediator.

Kentucky, however, is not unique in having no or only a rudimentary system for regulating mediators. Only 17 states have mandatory codes of ethics and none of them apply to all mediators practicing within their states.¹¹ Thus, most mediators in most states, unless they wish to work in court-connected programs, can hang up a shingle without meeting any licensing or

programs); Dorothy J. Della Noce et al., *Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection*, 3 PEPP. DISP. RESOL. L.J. 11 (2002) (reviewing studies of court-connected mediation programs, discussing the tensions between the interests of the courts and mediator values, and identifying system design issues); Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81 (suggesting that no evidence exists that the public prefers mediation to litigation and suggesting reforms in court-connected ADR programs); Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117 (2004) [hereinafter Welsh, *Court-Connected Mediation*] (urging greater use of mediation in U.S. judicial system); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002) [hereinafter Wissler, *What We Know*] (discussing the effectiveness of court-connected mediation in Ohio courts and recommending continued research).

⁹ The "Application to be Placed on the Mediator Roster" requires the following certification in the signature block: "I further certify that I have read and understand the Mediation Guidelines for the Court of Justice Mediators [and] agree to adhere to the ethical guidelines as stated in Section 3" Kentucky Court of Justice, Division of Mediation Services, http://www.kycourts.net/AOC/MAFCS/MAFCS_MSForms.shtm (last visited Mar. 2, 2006). Thus, the Kentucky Administrative Office of the Courts, Mediation and Family Court Services can only require, by agreement, that mediators seeking to be placed on the court's roster of neutrals adhere to the guidelines.

¹⁰ The use of the term "grieving party" describes someone who files a formal or informal complaint against a mediator, but the term also connotes the great sense of loss many unhappy parties may feel after a mediation they feel the mediator conducted unfairly or improperly. They may lose important substantive rights. They may lose the ability to determine aspects of their future lives that will help them financially, emotionally, and psychologically. They may lose faith in a judicial system they thought was designed to protect them. They certainly lose faith in the process of mediation.

¹¹ See discussion *infra* note 48 and accompanying text.

training requirements or agreeing to be bound by any ethical guidelines.¹² Most mediators are beyond any state-sponsored sanctioning process.

II. THIS ARTICLE

Section III of this article briefly summarizes some of the components of an integrated system of mediator regulation. It also briefly discusses the current debate about whether the mediation field requires more regulation and, if so, what kind of regulation the field should create. Section IV discusses the research on mediation party satisfaction and malpractice lawsuits filed against mediators in courts. While eight states have created mediator grievance systems, this article summarizes the number and nature of complaints filed against mediators with program administrators in the five states with well-developed, state-sponsored grievance systems.¹³ The appendices to the article, however, include data for seven state grievance systems.¹⁴ In addition, this article does not discuss the South Carolina grievance system, which the courts have not fully implemented.¹⁵

¹² Florida requires persons seeking to become barbers to complete 1200 hours of training, 1000 hours of which must be actual school hours. FLA. STAT. ANN. § 476.114(2)(c) (West Supp. 2005). They must also take a written examination. FLA. STAT. ANN. § 476.134 (West 2001). Virginia's Board for Professional and Occupational Regulation requires aspiring barbers and cosmetologists to complete 1500 hours of training. Barbers and Cosmetology Regulations 18 VAC 41-20-20 (2003), *available at* http://www.state.va.us/dpor/bnc_regs.pdf. It requires nail technicians, wax technicians, and hair braiding license applicants to complete 150 hours, 115 hours, and 170 hours of training, respectively. *Id.*; Wax Technicians Regulations 18 VAC 41-40-20 (2004), *available at* http://www.state.va.us/dpor/bnc_Wax%20Tech%20Regulations.pdf; Hair Braiding Emergency Regulations 18 VAC 41-30-20 (2004), *available at* http://www.state.va.us/dpor/hbr_reg.pdf. They must also take a written examination and pass a criminal background check. Barbers and Cosmetology Regulations, *supra*; Wax Technicians Regulations, *supra*; Hair Braiding Emergency Regulations, *supra*.

¹³ This article discusses North Carolina's recently revised grievance system in Section VI.H.1. Its grievance data appears in Appendix H.

¹⁴ The author received late in the publication process for this article, complaint data from North Carolina and Arkansas. The additional data appears in the appendices, but is not discussed in the text of this article. *See also* Arkansas Judiciary, Alternative Dispute Resolution Commission, <http://courts.state.ar.us/courts/adr.html> (last visited Mar. 2, 2006). E-mail from Jennifer Taylor, Coordinator, Arkansas Alternative Dispute Resolution Commission, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Feb. 6, 2006, 13:55 EST) (transmitting the Arkansas ADR Commission Summary of Disciplinary Matters Prior to Implementation of Certification) (on file with the

Section V considers the advantages of developing complaint handling systems. It identifies the problems created when states do not provide effective mechanisms for dissatisfied mediation parties to file claims against mediators.

Section VI of the article compares the regulatory systems in place in Florida, Virginia, Georgia, Minnesota, and Maine, with a particular focus on the procedures followed in handling complaints filed against mediators. It also considers the revised grievance system in North Carolina and the proposed system in Maryland. In addition, this section considers other regulatory infrastructure that a state or court may first need to provide before it can successfully implement a grievance system. It also describes the components of a well-designed system. It considers issues of public access to grievance related information, the process for filing grievances, and any time limitations or restrictions the designers should consider. It discusses who should determine whether a formal complaint has any merit, who should investigate the complaint, informal procedures for handling complaints, formal hearing requirements, and appeals. It also considers the disciplinary approaches the grievance system can take when it resolves a complaint with merit. It discusses concerns about confidentiality of the complaint process and information about complaints and their resolution. Finally, it looks at the legal protections states have provided for persons handling complaints. This section shows that the complaint systems in these five states are only one part of a highly-structured system of mediator regulation.

Section VII discusses the factors designers may want to consider when designing a complaint handling system for a court-connected mediation program. It also considers the procedural justice and due process concerns that arise in the complaint processing context.

author). In keeping with the focus of this article, the summary appearing in Appendix I does not include a complaint about a mediator who failed to make a disclosure on his certification application or a complaint involving the alleged embezzlement of a non-profit organization's funds by a certified mediator while she was not engaged in a mediation.

¹⁵ South Carolina has had rules for some time that allowed the creation of a disciplinary process, "but only recently started to implement them with any rigor—probably because until 2002, [South Carolina] had no administrator *per se*." E-mail from Andrew Walsh, Administrator, South Carolina's ADR Commission and Board of Arbitrator & Mediator Certification, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Oct. 7, 2005, 16:31 EST) (on file with the author).

III. OVERVIEW: REGULATING MEDIATORS

Over the past several years, ADR practitioners and scholars have increasingly considered whether mediators are engaged in a profession and, if so, whether the regulation of those professionals requires greater attention and concern. This conversation leads to a discussion of the type of regulation states, ADR organizations, and courts should consider imposing on mediators. Many people express concerns that even well-intentioned regulation of mediators and the mediation field will make mediation unduly rigid, expensive, and less accessible to the public.¹⁶

A recent issue of *Dispute Resolution Magazine*,¹⁷ the publication of the American Bar Association's Section of Dispute Resolution, identified many of the issues and elements of the debate about imposing greater indicia of professionalism on mediators, including tighter barriers to entry and mandatory codes of ethics. It captured several competing views. Craig McEwen urges the field to consider proposals for certifying mediators as a part of the wider strategies we could adopt to build collegial control of the field in which mediators work in a variety of practice types.¹⁸ He describes some of those strategies. They include certifying mediators, certifying training programs, building local organizations that reinforce professional standards and expectations, creating professional standards for specific mediation programs, adopting formal rules of ethics, creating informal fora for peer discussion of those rules, designing formal complaint systems with admittedly limited practical reach, and enhancing informal peer controls and intervention when a colleague's conduct falls short of the professional standards.¹⁹

Sarah Cole summarizes recent efforts by the American Bar Association, the Association for Conflict Resolution, Florida, and the Federal Mediation

¹⁶ SARAH RUDOLPH COLE, NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW POLICY & PRACTICE* 11–12 (2d ed. 2005). I have resolved this debate for myself, at least in the context of court-connected mediation, in favor of more comprehensive regulation. My current opinion has been influenced in no small way by my move four years ago from a state with little regulatory infrastructure—Missouri—to a state with a highly developed, and some would say rigid, regulatory infrastructure—Virginia. As discussed *infra* in Section VI.C, adhering to the requirements of the Virginia regulatory system has made me a more knowledgeable and skillful mediator without incrementally increasing the expense of my practice or the public's access to my services.

¹⁷ See generally *DISP. RESOL. MAG.*, Spring 2005, at 3, 3–16.

¹⁸ Craig McEwen, *Giving Meaning to Mediator Professionalism*, *DISP. RESOL. MAG.*, Spring 2005, at 3, 5.

¹⁹ *Id.* at 5–6.

and Conciliation Service to design mediator certification standards.²⁰ She also analyzes the goals of certification, the definition of a quality mediator,²¹ and the efficacy of certification standards in reaching those goals. She also discusses the link between training and mediator quality. The goals, largely symbolic, include “protecting and assisting consumers, improving overall mediator quality, and enhancing the credibility of ‘good’ mediators in the marketplace.”²² Finally, she questions whether currently proposed certification systems will enhance diversity in the mediator pool.²³

In the same issue of *Dispute Resolution Magazine*, Nancy Welsh and Bobbi McAdoo note the distinction between professions and occupations: “Professions . . . are characterized by a distinct knowledge system that serves as a conceptual map binding together the members of the profession and framing the way in which they think about, reason through, and act upon problems.”²⁴ They suggest that mediators do not substantially agree that their work is based on a “systematic body of esoteric, abstract knowledge.”²⁵ Thus, mediators cannot agree on the “approach, skills or ethics mediators should share.”²⁶ Welsh and McAdoo conclude that the mediation field is not as professional as we would like to believe,²⁷ as evidenced by research and “alarming” anecdotes that many mediators fail to know of and adhere to professional standards of conduct and the core values of mediation.²⁸

Judith Filner, in an earlier issue of the magazine, also questioned whether mediation was a profession. She acknowledged in the introduction to her interview of Juliana Birkoff and Robert Rack that “[s]ome say [the field] is growing into a profession and that regulation is appropriate, necessary, and the responsible thing to do now.”²⁹ Persons holding this view express concern that if the field does not begin to regulate itself, “less knowledgeable

²⁰ Sarah Randolph Cole, *Mediator Certification: Has the Time Come?*, DISP. RESOL. MAG., Spring 2005, at 7, 9–10.

²¹ See Paula M. Young, *The Who of Mediation—Part II: Wisely Choosing a Mediator*, ST. LOUIS LAW., at 9A, May 4, 2005.

²² Cole, *supra* note 20, at 7–8.

²³ *Id.* at 9.

²⁴ Nancy A. Welsh & Bobbi McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, DISP. RESOL. MAG., Spring 2005, at 13, 13.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 14–16.

²⁹ Juliana Birkoff, Robert Rack & Judith M. Filner, *Points of View: Is Mediation Really a Profession?*, DISP. RESOL. MAG., Fall 2001, at 10, 10.

groups and legislators will.”³⁰ Rack agrees that the field is becoming a profession based on his research showing that mediators think about power in similar ways and use power concepts to plan interventions in mediation. Rack, however, argues that mediation is “bigger than a profession and . . . resist[s] the temptation to try to capture and contain it.”³¹ He would characterize the field as a broad social movement.

Charles Pou, Jr. has firsthand experience in designing systems that enhance quality in the mediation field. His recent article covers the debate about how best to assure mediator competence and ethical practice.³² He recommends a conceptual grid for talking about the barriers to entering and staying in the field. He surveys some approaches taken so far by states, courts, and mediator organizations and questions their efficacy in reaching their stated goals. He also cites the limited research available on topics relating to quality assurance through credentialing and other efforts.

Expanding on his thoughts published in an earlier article,³³ he suggests that the field should be skeptical of efforts to impose mandatory quality assurance protocols.³⁴ Instead, he prefers an informal system that enhances mediation ethics by encouraging the discussion of the relationship between ethics and good practice, by providing a hotline or other real-time ethics feedback for mediators, by creating ethics websites and other informational sources, by developing case studies for use in mediator ethics training, by fostering peer or expert discussion groups that could focus on ethical issues, and by allocating more time to ethics in mediator training programs.³⁵

No agreement therefore exists about whether mediation is a profession. Even among those who agree that it is, strong disagreement exists about how it should be regulated. For purposes of this article, I side-step both issues, except that I believe a mandatory ethics code—applicable especially in court-connected mediation contexts—and a well-designed grievance system are essential to the field. These aspects of a regulatory system do not, however,

³⁰ *Id.*

³¹ *Id.* at 11.

³² Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303 *passim* [hereinafter Pou, *Assuring Excellence*].

³³ Charles Pou, Jr., “*Embracing Limbo*”: *Thinking About Rethinking Dispute Resolution Ethics*, 108 PENN. ST. L. REV. 199, 211–13 (2003) [hereinafter Pou, *Embracing Limbo*].

³⁴ Pou, *Assuring Excellence*, *supra* note 32, at 335, 351–53.

³⁵ *Id.* at 343–44.

preclude the adoption of more informal systems, like peer discussion groups, recommended by McEwen and Pou.

While many scholars and practitioners have supported ethics codes and grievance systems because they protect parties and the reputation of mediation as a process, I look at the issue from four additional perspectives. First, the systems protect the reputations and legitimacy of referring courts and the judicial system as a whole. Second, they encourage the use of better skills in mediation, give mediators greater self-awareness of the choices they make in mediation, encourage mediators to get additional training in dispute resolution theory, skills, and ethics, and help mediators with poor skills to improve them or agree to get out of the field. They therefore help mediators avoid conduct that may give rise to a professional complaint or malpractice suit. Third, I also believe that ethics codes and grievance systems help protect mediators from frivolous complaints and malpractice lawsuits filed by dissatisfied parties.³⁶ Finally, I believe they protect lawyers representing clients in mediation from malpractice lawsuits and other forms of client dissatisfaction.

A comprehensive regulatory system typically consists of several components. First, the regulatory system creates barriers of entry to the field³⁷ consisting of several possible components: (a) training requirements that vary depending on the type of mediations the mediator intends to conduct,³⁸ (b) ethics training,³⁹ (c) moral character reviews,⁴⁰ (d) minimum

³⁶ No empirical research supports this conclusion.

³⁷ Charles Pou, Jr. has created a "Mediator Quality Assurance Grid" which helps conceptualize the "prototypical" approaches to mediator training and other barriers to entering and staying in the field. The five approaches are: (1) No hurdle/No maintenance; (2) High hurdle/Low maintenance; (3) High hurdle/High Maintenance; (4) Low hurdle/Low maintenance; and (5) Low hurdle/High maintenance. Pou, *Assuring Excellence*, *supra* note 32, at 325. He explains that a "high hurdle" or an initial barrier of entry to the field could include many hours of training, experience, or observation requirements. *Id.* It could also include minimum degree credentials, performance based reviews or tests, moral character reviews, and high application fees. *Id.* Low hurdles are designed to allow people with little training and experience to enter the field. *Id.* at 325–26. Maintenance requirements include continuing education, a minimum number of mediations completed since the initial entry into the field, periodic renewal of the mediator's certification, registration or roster status, and renewal fees. Of the state regulatory systems analyzed below, Florida, Virginia, Georgia, and Maine have high initial entry barriers and high maintenance requirements in comparison with most other states. See discussion *infra* Section VI.

³⁸ In the specific context of mediator training, scholars have focused little on identifying good training components and techniques. Moreover, they have not often empirically proved the relationship between training and mediator competency. Cole,

degree or professional license requirements, (e) written tests,⁴¹ and (f)

supra note 20, at 11 nn.5–6. See Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 429, 436 (Jay Folberg & Ann Milne eds., 1988) (empirical evidence showing that lawyer and social worker mediators have higher settlement rates if the mediators have previously mediated greater than five cases); Wissler, *What We Know*, *supra* note 8, at 678–79 (finding training had no impact on settlement rates in mediation, but finding that experience did affect settlement rates); Nichol M. Schoenfield, Notes & Comments, *Turf Battles and Professional Biases: An Analysis of Mediator Qualifications in Child Custody Disputes*, 11 OHIO ST. J. ON DISP. RESOL. 469, 487 (1996) (studies reveal little variation in the success rates of attorney-mediators and mental health professional-mediators when compared to the success rates of volunteer lay people-mediators, citing Pearson & Thoennes study); see also James R. Antes & Judith A. Saul, *What Works in Transformative Mediator Coaching: Field Test Findings*, 3 PEPP. DISP. RESOL. L.J. 97 *passim* (2002) (describing techniques for the effective training of transformative mediators); Grace E. D'Alo, *Accountability in Special Education Mediation: Many a Slip 'Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201, 224–28 (2003) (recommending, based on survey data, use of more relevant tools to evaluate mediators and imposition of stricter training standards); Lela P. Love, *Twenty-Five Years Later with Promises To Keep: Legal Education in Dispute Resolution and Training of Mediators*, 17 OHIO ST. J. ON DISP. RESOL. 597, 601–02, 605 (2002) (noting that over the last 25 years, the mediation community has focused more attention on minimum training requirements, effective training curriculum, certifying trainers or training programs, the use of observations and co-mediation experiences as part of the training requirements, and continuing mediation education; also recommending that we “create more useable, tested, accessible, appealing, and downloadable training material”); Forrest S. Mosten, *Mediation 2000: Training Mediators for the 21st Century*, 38 FAM. & CONCILIATION CTS. REV. 17 *passim* (2000) (outlining training policy issues, components of an effective training program, and qualities of effective trainers). See generally DISP. RESOL. MAG., Fall 2005, at 5, 5–23 (discussing the views of 13 academics, lawyers, and mediators about mediator training).

³⁹ See, e.g., Mary Thompson, *Teaching Ethical Competence*, DISP. RESOL. MAG., Winter 2004, at 23, 23 (describing several types of interactive training exercises designed to teach mediation ethics).

⁴⁰ See generally Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 555–584 (1985) (criticizing moral character evaluations of applicants to the legal bar as inaccurate, ineffective, unfairly applied, and overly burdensome, resulting in a misdirection of resources).

⁴¹ See Association for Conflict Resolution, ACR Mediator Certification Task Force, Report and Recommendation to the ACR Board of Directors (March 31, 2004), <http://www.acrnet.org/about/taskforces/certification.htm> [hereinafter ACR Certification Task Force] (proposing test of 11 areas of knowledge, including communication, conflict theory, content management and resources, cultural diversity, ethics, history of mediation, models, strategies and styles, negotiation, process structure, role of third party, and systems and group dynamics).

performance-based testing or evaluation.⁴² The system may also grant official recognition that the mediator has passed these barriers to entry by certifying, registering, or rostering the mediator.⁴³ The regulatory system

⁴² Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 OHIO ST. J. ON DISP. RESOL. 965, 1000–03 (2004) (concluding no current performance test can adequately assess mediators with different styles or skills and suggesting different tests for different models of mediation practice); Roselle L. Wissler & Robert W. Rack, Jr., *Assessing Mediator Performance: The Usefulness of Participant Questionnaires*, 2004 J. DISP. RESOL. 229, 238–57 [hereinafter Wissler & Rack, *Participant Questionnaires*] (proposing the use of participant evaluations as a way to enhance mediator quality, based on a study in the federal courts).

⁴³ Several commentators categorize common credentialing options into six categories: statements of standards, registers, rosters, accreditation, certification, and licensure. Margaret S. Herrman et al., *Supporting Accountability in the Field of Mediation*, 18 NEGOT. J. 29, 33 (2002). A decade ago, Sharon Press, Director of the Florida Dispute Resolution Center (DRC), identified the debate over mediator qualifications and credentialing as “lively.” Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029, 1036 (1992–93). That debate is ongoing and perhaps even livelier. Forrest S. Mosten, *Institutionalization of Mediation*, 42 FAM. CT. REV. 292, 294–96 (2004) (discussing regulation of mediators, certification, and voluntary ethics standards); Stephanie A. Henning, Note, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189, 189 (1999) (“Mediator certification has long been a contentious issue in the mediation community, invoking concerns about the growth and diversity of the field, mediation’s obligations to participants, and most of all, the direction in which the field is evolving.”); Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723, 724 (1996) (“[I]dentification of the criteria by which qualified mediators may be distinguished from charlatans has proven elusive.”); Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. REV. 757, 761 (1996) (arguing that certification can protect consumers, but it can also be anti-competitive and elitist); see Cole, *supra* note 20, at 7 (“To assess whether this movement toward certification is cause for commendation or for concern, we must first consider the stated goals of certification . . .”); see also ABA SECTION OF DISPUTE RESOLUTION, TASK FORCE ON CREDENTIALING, REPORT ON MEDIATOR CREDENTIALING AND QUALITY ASSURANCE § 1(C), (Discussion Draft Oct. 2002), available at http://www.abanet.org/dispute/taksforce_report_2003.pdf [hereinafter ABA CREDENTIALING TASK FORCE REPORT] (recommending that the task force develop “model standards for mediator preparation programs [and] [o]utline one or more model systems of mediator credentialing . . . focusing initially on the accreditation of mediator preparation programs”); ACR Certification Task Force, *supra* note 41, *passim* (includes selected bibliography); Pou, *Assuring Excellence*, *supra* note 32, *passim*; ABA Task Force Formed to Improve Quality of Mediation, ADRWORLD.COM, Aug. 9, 2005, <http://www.adrworld.com/sp.asp?id=38754> (announcing ABA Task Force plan to survey consumers about how to improve the quality of mediation); Association for Conflict

may regulate or approve mediation training programs.⁴⁴ The system may also require mediators who have successfully passed the barriers of entry to prove at a later date—through a recertification or re-registration process—that they are committed to the mediation field and to their skill development.⁴⁵ The system may require continuing mediation education, including additional ethics training, or proof that the mediator has completed a specified number of mediations in a specified time period. The regulatory system may also support mediators by providing ethics information,⁴⁶ encouraging

Resolution, Conflict Resolution Organizations Join Forces to Explore Feasibility of a National Mediator Certification Program (Sept. 23, 2004), <http://www.acrnet.org/about/pressreleases/pr-cert.htm>. See generally DISP. RESOL. MAG., Fall 2001, at 3, 3–21 (presenting perspectives of Judith M. Filner, Steven T. Peluso, Juliana Birkoff, Robert Rack, Ellen Waldman, and Peter R. Maida).

⁴⁴ See generally ABA CREDENTIALING TASK FORCE REPORT, *supra* note 43, at 3–6.

⁴⁵ See citations *supra* note 43.

⁴⁶ Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 692–97, 701–06 (2001) (discussing the ethics of facilitated negotiation and lawyers participating in mediation); Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1 *passim* (discussing study of ethical dilemmas reported by mediators and creating nine conceptual categories for analyzing them); Fiona Furlan et al., *Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators?*, 14 J. AM. ACAD. MATRIM. L. 267, 287–92 (1997) (discussing the extent to which rules of lawyer professional responsibility apply to the attorney-mediator); Alison E. Gerencser, *Alternative Dispute Resolution Has Morphed into Mediation: Standards of Conduct Must Be Changed*, 50 FLA. L. REV. 843, 857–64 (1998) (rejecting a “one size fits all” approach to writing mediator standards of practice and recommending standards of conduct for different types of mediation); Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 479, 511–16 (2000) (advocating “targeted” rules of professional conduct that address the “cross-practice” ethical issues faced by lawyer-mediators); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Advisory Conception of Lawyers’ Responsibilities*, 38 S. TEX. L. REV. 407, 409, 448–53 (1997) (suggesting that ethics rules governing neutrals will have to reflect “variations of task and functions within different ADR forms and settings”); Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?* 38 S. TEX. L. REV. 669, 678 (1997) (arguing against ethics rules precluding a mediator from giving legal advice, information, or evaluations); Pou, *Embracing Limbo*, *supra* note 33, at 210–13; James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 771–72, 797 (1997) (asserting that the problem with evaluations in mediation is not one of ethics but one of practice; they are often “stunted,” misleading, and insufficient thereby undermining the parties’ ability to make reasonably informed decisions); Fran L. Tetunic, *Florida Mediation Case Law:*

compliance with aspirational ethics guidelines,⁴⁷ creating a mandatory ethics

Two Decades of Maturation, 28 NOVA L. REV. 87, 91–142 (2003) (reviewing case law on confidentiality in mediation, meaningful attendance at mediation, enforcement of mediation agreements, and other mediation related issues); Madeleine H. Johnson, Student Work, *What's a Mediator to Do? Adopting Ethical Guidelines for West Virginia Mediators*, 106 W. VA. L. REV. 177, 187–92 (2003) (focusing on lack of ethical guidance provided to West Virginia mediators); McEwen, *supra* note 18, at 6 (suggesting that ethics rules serve as tools for peer group reflection on and discussion of ethics issues); Charles Pou, Jr., *Enough Rules Already!*, DISP. RESOL. MAG., Winter 2004, at 19, 19–22 [hereinafter Pou, *Enough Rules*] (arguing that the development of ethics rules and procedures in a “top down” approach will be a non-inclusive, inactive “navel-gazing” process; advocating, instead, better training of neutrals about ethical issues). See generally Diane K. Vescovo et al., *Essay—Ethical Dilemmas in Mediation*, 31 U. MEM. L. REV. 59, 66–97 (2000) (analyzing the impartiality and confidentiality issues raised in a hypothetical case).

⁴⁷ Several national organizations have developed rules of ethics that are aspirational or apply to mediators who are members of the organization. For example, the American Arbitration Association (AAA), ABA, and the Society of Professionals in Dispute Resolution (SPIDR) developed the MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994). See also MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), <http://www.afccnet.org/pdfs/modelstandards.pdf>; Nat'l Ass'n for Cmty. Mediation, NAFCM Quality Assurance Statement, <http://www.nafcm.org/pg9.cfm> (last visited Mar. 2, 2006); Victim-Offender Mediation Ass'n, Recommended Ethical Guidelines, <http://www.voma.org/docs/ethics.doc> (last visited Mar. 2, 2006). For articles about the 1994 Joint Standards, see John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 456–76 (1997) (describing drafting history of Joint Standards developed by the ABA, AAA and SPIDR); Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87 (1997) [hereinafter Moffitt, *Remodeling*] (arguing that the Model Standards failed to achieve the drafters' goals of serving as a guide for the conduct of mediators, informing the mediating parties, and promoting confidence in mediation as a process of dispute resolution).

In 2002, a committee comprising members of the ABA, ACR, and the AAA began revising the 1994 MODEL STANDARDS OF CONDUCT FOR MEDIATORS. A task force of the ABA's Section of Litigation also helped in the revision process. On August 9, 2005, the ABA House of Delegates adopted the revised standards. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005) [hereinafter 2005 JOINT STANDARDS], available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf>; see also ABA House Approves Mediator Standards, *New Stance on Fees*, ADRWORLD.COM, Aug. 11, 2005, <http://www.adrworld.com/sp.asp?id=38764>; REPORTER'S NOTES (April 10, 2005), http://www.abanet.org/litigation/documents/hod_0805/hod_reportsnotes.pdf (describing the drafting history of the 2005 Joint Standards, the guiding principles of the drafters, and an analysis of the 2005 Joint Standards). For an article about the 2005 Joint Standards, see Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR and*

code,⁴⁸ and issuing ethics advisory opinions.⁴⁹ The regulatory system may

AAA Adopt Revised Model Standards of Conduct for Mediators, __ APPALACHIAN J.L. __ (forthcoming 2006).

State courts have also adopted aspirational guidelines. *See, e.g.,* Hawaii Sup. Ct., GUIDELINES FOR HAWAII MEDIATORS (Haw. 2002), available at <http://www.courts.state.hi.us/attachment/3D52C4AB783B29B7EC64289CC8/guidelines.pdf> ("The Guidelines are not promulgated as binding rules, and they are not intended to regulate the work of mediators.").

⁴⁸ Only 17 states or state supreme courts currently require certain mediators to comply with mandatory ethics standards. *See* ALABAMA CODE OF ETHICS FOR MEDIATORS (Ala. Sup. Ct. 1996), available at http://alabamaadr.org/flashSite/Standards/al_code_ethics.html (guidelines for all mediators, but serve as a basis for removal from the mediator roster maintained by the Alabama Center for Dispute Resolution); REQUIREMENTS FOR THE CONDUCT OF MEDIATION AND MEDIATORS (Ark. Alt. Disp. Resol. Comm'n), available at http://courts.state.ar.us/pdf/0516_conduct.pdf (applying to all mediators included on the Arkansas ADR Commission Roster of Mediators and may serve as a basis for disqualification from roster; Commission recommends other mediators adhere to the requirements); COURT-CONNECTED CHILD CUSTODY MEDIATION, R. 5.210 (Cal. Rules of Ct. 2001), available at <http://www.courtinfo.ca.gov/rules/titlefive/title5-1-282.htm#TopOfPage> (standards of practice for mediations conducted under Family Code sections 211, 3160, and 3162(a)); RULES OF CONDUCT FOR MEDIATORS IN COURT-CONNECTED MEDIATION PROGRAMS OF CIVIL CASES, Rule 1620 (Cal. Rules of Ct. 2003), available at <http://www.mediationtools.com/rules/crc1620.html> (rules for mediators working in court-connected mediation programs for general civil cases; adopted by the California Judicial Council, which is the governing body of the Administrative Office of the Courts); FLA. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS, R. 10.200-10.690 (Fla. Sup. Ct. Standing Comm. on Mediation and Arbitration Rules 2000) [hereinafter FLA. STANDARDS OF CONDUCT], available at http://www.flcourts.org/gen_public/adr/certrules.shtml (mandatory standards for mediators participating in court-sponsored programs); ETHICAL STANDARDS FOR MEDIATORS, ALTERNATIVE DISPUTE RESOLUTION RULES, App. C, ch. 1(A) (Ga. Sup. Ct. amended 2005) [hereinafter GEORGIA ETHICAL STANDARDS], available at http://www.godr.org/ethics_info.html (mandatory standards for mediators serving court programs); RULES RELATING TO MEDIATION, R. 903 (Kan. Sup. Ct. 1996), available at <http://www.kscourts.org/ctruls/adrruls.htm> (mandatory rules for mediators of cases falling under Rule 902 or under the Dispute Resolution Act, K.S.A. 5-501 *et seq.*, including cases referred to mediation by the state courts, state government, or when required by statute); CODE OF CONDUCT FOR ME. JUDICIAL BRANCH ADR NEUTRALS (Me. Sup. Ct. 2001), available at http://www.courts.state.me.us/courtservices/adr/adr_rules.html [hereinafter ME. CODE OF CONDUCT] (mandatory guidelines for mediators working in court-connected mediation programs); UNIFORM RULES ON DISPUTE RESOLUTION, R. 1.18 (Mass. Sup. Jud. Ct. 2005), available at <http://www.mass.gov/courts/admin/legal/redbook11.html> (mandatory for court-connected dispute resolution); MINN. GEN. RULES OF PRACTICE, R. 114 APP. (Minn. Sup. Ct. Gen. Rules of Practice 1997) [hereinafter MINN. CODE OF ETHICS],

available at <http://www.courts.state.mn.us/documents/adr/codeofethics.doc> (binding standards of conduct applying to individuals and organizations approved by the ADR Review Board); STANDARDS OF CONDUCT FOR MEDIATORS IN COURT-CONNECTED PROGRAMS (N.J. Sup. Ct. 2000), available at <http://www.judiciary.state.nj.us/notices/n000216a.htm> (mandatory standards for all mediators "when they are acting in state court-connected programs mediating matters in the Municipal Courts, or in the Superior Court."); STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS (N.C. Sup. Ct. 1998), available at <http://www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Default.asp> (mandatory standards for certified and non-certified mediators participating in the superior court Mediated Settlement Conference Program, the district court Family Financial Settlement Program, or the Pre-litigation Farm Nuisance Mediation Program); RULES AND PROCEDURES FOR THE DISPUTE RESOLUTION ACT, App. A (Okla. Sup. Ct. amended 2005) ("[I]ntended to establish minimum principles applicable to all mediators"); FAMILY COURT MEDIATION, App. B (S.C. Jud. Dep't), available at <http://www.judicial.state.sc.us/courtReg/arbmedb.html> (apply to "[a]ny person serving as a mediator, whether certified or not"); S.D. CODIFIED LAWS § 25-4-58.2 to 25-4-62 (1999) (family mediators "should conduct themselves and mediations according to the following principles."); RULES OF THE SUPREME COURT OF THE STATE OF TENNESSEE, R. 31 App. A (Tenn. Sup. Ct. 2001), available at http://www.tsc.state.tn.us/opinions/tsc/rules/TNrulesofcourt/06supct25_end.htm#31 (mandatory standards for Rule 31 ADR proceedings and neutrals serving pursuant to Rule 31; does not affect ADR neutral practice in private sector); RULES OF COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION, R. 104 (Ut. Sup. Ct.), available at <http://www.utcourts.gov/resources/rules/adr/104.htm> (applies to all mediators on the court roster acting pursuant to the Utah Rules of Court-Annexed Alternative Dispute Resolution and the Code of Judicial Administration Rule 4-150); STANDARDS OF ETHICS AND PROF'L RESPONSIBILITY FOR CERTIFIED MEDIATORS (Jud. Council of Va. 2002) [hereinafter VIRGINIA SOES], available at <http://www.courts.state.va.us/soe/soe.htm> (applying to all certified mediators). The mandatory rules governing mediators appear as statutes, court rules, court orders, and internal operating procedures. Accordingly, they are difficult to research and this list may not be inclusive.

⁴⁹ See Bruce A. Blitman, *Mediator Ethics: Florida's Ethics Advisory Committee Breaks New Ground*, DISP. RESOL. MAG., Spring 2001, at 10 *passim* (describing origin of committee, its approach to decision-making and some of the opinions it has issued); Arthur Garwin, *Double Identity: Ethics Issues Do Not Disappear for Lawyers who Serve as Mediators*, A.B.A. J., June 1998, at 88, 88 (1998) (examining state bar ethics opinions affecting lawyer-mediators). Few state courts or professional organizations issue ethics advisory opinions involving mediators. They are difficult to find on the internet and no other resource creates easy access to them. Moreover, bar panels typically issue the opinions relating to the unauthorized practice of law. Often, the membership of these panels does not include lawyer-mediators, so the opinions often fail to reflect a thoughtful resolution of the tensions between the values and concerns of the two professions. As discussed *infra* notes 302-05, 413-14, 524-25, and 803-04 and accompanying text, Florida, Virginia, Georgia and North Carolina make ethics advisory opinions available on their ADR-related court websites.

further provide rules or guidelines for interacting in the legal world⁵⁰ on issues of mediation confidentiality,⁵¹ the unauthorized practice of law (UPL),⁵² and mediator immunity.⁵³ It should offer public oversight through

⁵⁰ Uncertainty and controversy exist in mediation practice when expectations, values, competing interests, and public policy clash at the intersection of the mediation world with the legal world. For instance, confidentiality in mediation pits two competing public policies against each other. The first policy seeks to preserve confidentiality in the mediation process to encourage candor in the exchange of information that will, in turn, lead to the early and cost-effective resolution of disputes. The second policy emphasizes the justice system's need to consider in judicial and administrative proceedings all of the available evidence. *See generally* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 22–25, 31–36 (1986) (concluding that a blanket privilege protecting the confidentiality of mediation communications “is a bad idea”). *See also* Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened*, 2003 J. DISP. RESOL. 135 *passim* (discussing tension between strict mediation confidentiality rules and contract law governing enforcement of contracts).

⁵¹ Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79 *passim* (2001) (urging the adoption of the Uniform Mediation Act (UMA) to create more predictability in determining the scope of confidentiality in mediation and identifying the risks of the current state-by-state rules and statutes); Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99 *passim* (providing previously unpublished history of the UMA drafting process and responding to criticisms of the model law); Joseph B. Stulberg, *The UMA: Some Roads Not Taken*, 2003 J. DISP. RESOL. 221 *passim* (examining the drafting process of the UMA and urging states to consider more substantial protections than provided in the model law); *see generally* *Uniform Mediation Act Symposium: Uniform Mediation Act*, 2003 J. DISP. RESOL. 1 *passim* (discussing goals of the UMA and the problems it creates, may solve, and ignores).

⁵² *See* ABA SECTION OF DISP. RESOL., RESOLUTION ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW (adopted Feb. 2, 2002), *available at* <http://www.abanet.org/dispute/resolution2002.pdf> (identifying growing consensus that mediation is not the practice of law); ACR BD. OF DIR., THE AUTHORIZED PRACTICE OF MEDIATION: PROPOSED POLICY STATEMENT OF THE ASSOCIATION FOR CONFLICT RESOLUTION (Sept. 28, 2004), <http://www.acrnet.org/about/initiatives/publicpolicy/upl/htm> (identifying mediation as a practice distinct from law; listing those mediation activities a mediator should be able to conduct without engaging in UPL so long as they are conducted consistently with mediation's core values; identifying activities improper for a mediator); *see also* Phyllis E. Bernard, *Dispute Resolution and the Unauthorized Practice of Law*, in *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE* 89 (Phyllis Bernard & Bryant Garth eds., ABA 2002); James M. McCauley, *Professional Responsibility*, 39 U. RICH. L. REV. 315 *passim* (2004) (reviewing unauthorized practice of law rulings in Virginia); Carrie

Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALT. TO HIGH COST LITIG. 57 *passim* (1996) (arguing that mediation is the practice of law, especially when mediators predict court outcomes or evaluate the merits of the parties' legal positions); Bruce Myerson, *Lawyers Who Mediate are Not Practicing Law*, 14 ALT. TO HIGH COST LITIG. 74, 74-75 (1996) (arguing that mediators do not practice law and they should not give legal advice); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235 *passim* (2002) (arguing that UPL guidelines leave non-lawyer mediators unsure of permitted practices, asserting that the consumer protection rationale of UPL regulation is a "myth," demonstrating how non-lawyer mediators regularly engage in the practice of law, and calling for greater honesty in the way we protect mediation parties); Geetha Ravindra, *When Mediation Becomes the Unauthorized Practice of Law*, 15 ALT. TO HIGH COST LITIG. 94 *passim* (1997) (analyzing case law and ethics opinions on UPL in Virginia); Matt Wise, *Separation Between the Cross-Practice of Law and Mediation: Emergence of Proposed Model Rule 2.4*, 22 HAMLINE J. PUB. L. & POL'Y 383, 398-99 (2001) (suggesting ABA must decide when lawyer-mediators may be practicing law before codifying model rule that applies to lawyers serving as neutrals); Andrew S. Morrison, Comment, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 CALIF. L. REV. 1093, 1095, 1096-1107, 1155 (1987) (examining the five tests courts use to determine if someone is engaged in UPL, finding that the tests yield a line of decisions consistent only in their inconsistency, and concluding that non-lawyer-divorce mediators are not engaged in the practice of law, but that lawyer-divorce mediators are); Joshua R. Schwartz, Note, *Laymen Cannot Lawyer, But Is Mediation the Practice of Law?*, 20 CARDOZO L. REV. 1715, 1746 (1999) (concluding that facilitative mediators engage in the practice of law when they make editorial suggestions to the memorialized agreement rather than serving merely as a scrivener; further concluding that evaluative mediators who give legal opinions and predictions regarding disputed facts engage in the practice of law); John W. Cooley, *Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR*, DISP. RESOL. J., Aug.-Oct.2000, at 72 *passim* (arguing that Virginia's guidelines on UPL frame the wrong question and provide little help to mediators about lawful behavior); Furlan et al., *supra* note 44, at 276-78; Mark Hansen, *At the Crossroads: States Focus on UPL Enforcement and Regulation of Nonlawyer Practitioners*, A.B.A. J., May 2005, at 62; David A Hoffman & Natasha A. Affolder, *Mediation and UPL: Do Mediators Have a Well-Founded Fear of Prosecution?*, 6 DISP. RESOL. MAG., Winter 2000, at 20, 22-23 (calling for a new approach to analyzing UPL in the mediation context and suggesting that greater regulation of mediators may discourage regulation by those outside the field); Bridget Hoy, *Watch What You Say: Avoiding the Accidental Attorney-Client Relationships*, ILL. B.J., Jan. 2005, at 22 *passim* (discussing the inadvertent creation of an attorney-client relationship); Roger C. Wolf, *The Grey Zone: Mediation and the Unauthorized Practice of Law*, MD. B.J., July/Aug. 2003, at 40, 41-42 (2003) (describing five approaches to determining whether a mediator is engaged in UPL).

⁵³ COLE ET AL., *supra* note 16, at 11-3, 11-8 to 11-14 (summarizing approaches taken by states when providing mediator immunity); see Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 47 (1986) (concluding that mediators do not need protection

well-designed grievance systems.⁵⁴ Finally, a comprehensively designed regulatory system will grant the state supreme court or its ADR administrator

from legal liability and that immunity might cause a decline in the quality of mediation); Brian Dorini, *Institutionalizing ADR: Wagshal v. Foster and Mediator Immunity*, 1 HARV. NEGOT. L. REV. 185 *passim* (1996) (concluding that immunity for mediators is an important component of the mediation infrastructure, but also recommending improved training of mediators and clearer confidentiality guidelines); Caroline Turner English, *Mediator Immunity: Stretching the Doctrine of Absolute Quasi-Judicial Immunity: Wagshal v. Foster*, 63 GEO. WASH. L. REV. 759 *passim* (1995) (discussing case in which the D.C. Circuit extended absolute immunity to mediators; recommending qualified immunity for mediators); Amanda K. Esquibel, *The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity*, 31 RUTGERS L.J. 131, 141–48, 155–65 (1999) (surveying state laws and court opinions on mediator immunity and analyzing the costs and benefits of immunity); Scott H. Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 OR. L. REV. 107 *passim* (2004) (discussing court rules and legislation creating mediator immunity and suggesting immunity shifts risk of mediator misconduct from the mediator and courts to mediation parties); Cassondra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 OHIO ST. J. ON DISP. RESOL. 629, 662–64 (1997) (recommending absolute immunity for mediators working in court-connected programs and qualified immunity for mediators taking privately referred cases; as an alternative, recommending that courts offer mediators government paid legal representation if a mediator is sued, government paid malpractice insurance, or indemnification when mediators work in court-connected programs); James L. Knoll, *Protecting Participants in the Mediation Process: The Role of Privilege and Immunity*, 34 TORT & INS. L.J. 115, 122–30 (1998) (describing common law judicial and quasi-judicial immunity and state statutory immunity for mediators); Joseph B. Stulberg, *Mediator Immunity*, 2 OHIO ST. J. ON DISP. RESOL. 85, 85 (1986) (recommending legislation making mediators completely immune from legal liability).

⁵⁴ My thinking about these regulatory components has been influenced by audio taped programs presented at the ACR Third Annual Conference, The World of Conflict Resolution: A Mosaic of Possibilities in Orlando, Florida From Oct. 15–18, 2003. These recordings are available through Convention Recordings International Inc., www.conventionrecordings.com, unless otherwise indicated and are on file with the author. ASS'N FOR CONFLICT RESOLUTION, THE WORLD OF CONFLICT RESOLUTION: A MOSAIC OF POSSIBILITIES (3d Ann. Conf., Session Material 2003) (including Mary Thompson, *Teaching Mediation Ethics: Issues, Processes and Techniques*, Session PC 1.02; Melvin Rubin & Michael McGirney, *Mediator Malpractice*, Session 1.10; Rebecca T. Macgruder, *The Slippery Slope*, Session 1.12; Margaret Dale & William Shea, *The Ethical Mediator: Do You Practice What You Believe?*, Session PC 3.07; Hans Boserup, *Advanced Techniques and Dilemmas in Mediation*, Session PC 3.09; Diane Kenty, Sharon Press & Leila Taaffe, *Responding to the Unhappy Consumer*, Session 3.19; Greg Firestone, *Impartiality and Neutrality: Are These Concepts Still Relevant to the Practice of Mediation*, Session 4.05; Sharon Press et al., *Joint Committee on Model Standards of Conduct for Mediators*, Session 6.08; John Lande et al., *Delivering Quality Mediation: What's Ethics Got to Do With It?*, Session 7.03; Margaret S. Powers, *The Over Eager Mediator: I Aim to Please*, Session 7.07; Margaret S. Powers et al., *ACR Town Meeting*

the power to sanction mediators for ethical violations or other misconduct. Those sanctions would at least include the ability to remove mediators from court-approved mediator rosters.

While this article could focus on any one of the components of an integrated system for regulating mediators, it will focus on the need for and design of an effective grievance system based primarily on procedural justice values. It also questions whether a grievance system can operate in a state without an ethical code of conduct for mediators.

Only seven states have implemented most or all of these components of a comprehensive mediator regulatory system.⁵⁵ Florida's more mature system reflects its 30 year experience with court-connected mediation. Virginia modeled its system on Florida's system, and Georgia in turn modeled its system on Virginia's system. Minnesota designed its grievance rules the same year Virginia adopted its grievance system. Maine, the most recently designed regulatory system, has the least formal grievance process. Section VI of this article examines these systems in detail. This section also discusses the revised system in North Carolina and the proposed system in Maryland.

IV. WHERE DO ALL THE UNHAPPY MEDIATION PARTICIPANTS GO? WHAT DO THEY DO?

A. Satisfaction of Mediation Participants

Clare Smith is not unique in her dissatisfaction with her mediator or the mediation process. Satisfaction studies show that 65 to 82 percent of parties

on *Ethical Practice*, Session 8.01; and Suzanne McCorkle & Melanie Reese, *Mediator Ethics: Does it Make a Difference What or Where You Practice?*, Session 8.09); see also Clarence Cramer et al., *Ethical Dilemmas for Family and Divorce Mediators: An Update and Panel Perspective*, Session 4.21 at the ACR 2004 Annual Conference, Valuing Peace in the 21st Century: Expanding the Art and Practice of Conflict Resolution (Sacramento, Cal. Sept. 29–Oct. 2, 2004), available at <https://www.nrstaping.com/acr/acro2004.htm>.

I also attended the following ethics related conference programs: Jack Hanna, Carrie Menkel-Meadow, Eric Tuchman, John J. Welsh & Terrence T. Wheeler, *A National ADR Ethics Board—Is it Time?*, Session C9; and Josh Stulberg, Wayne Thorp & Susan Yates, *The New Model Standards of Conduct for Mediations*, Session E9 at the ABA Section of Dispute Resolution, The Golden State of ADR, Seventh Annual Conference (Los Angeles, Cal. Apr. 14–16, 2005). The ABA did not record these sessions. Conference papers for the sessions are available on a CD-ROM from the ABA Section of Dispute Resolution, 740 15th Street, N.W., Washington, D.C. 20005.

I also acknowledge the role a new ethics book played in my thinking on the subject. See generally DISPUTE RESOLUTION ETHICS, *supra* note 52.

⁵⁵ See comments *supra* notes 13–15 and accompanying text.

to family mediation viewed their mediators as "warm, sympathetic, and sensitive to feelings."⁵⁶ They found them "helpful in standing up for their rights in disagreements with spouses; staying focused on the important issues; and having clear and sufficient information for decisionmaking."⁵⁷ But 18 to 35 percent of parties did not feel this way after the mediation.

A majority of parties participating in court-connected civil mediations felt that the mediation process was fair and gave the parties sufficient opportunity to present their cases. A majority of parties felt they had control over the process or had input in determining the outcome. Most parties thought the mediator was neutral, did not pressure them to settle, understood their views and issues, and treated them with respect. A majority of parties felt the mediation resulted in a fair agreement. Most attorney-advocates shared the same feelings. But some minority of parties and attorneys did not have these feelings about the experience.⁵⁸

Sixty-one percent of disputants in 54 waste management mediations were satisfied with the mediation process and the outcome. But 39 percent of mediation-disputants were not.⁵⁹ Another survey found higher levels of satisfaction in a Pennsylvania special education mediation program. There, 82 percent of clients were "very satisfied" or "satisfied" with the actions of the mediator and the process.⁶⁰ Yet, 18 percent of participants were neutral or dissatisfied with the mediator or the process.

In short, studies suggest that perhaps a third of mediating parties are unhappy with the process or the mediator.⁶¹ However, the statistics on

⁵⁶ Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3, 17-18 (2004) (the author summarizes this and additional research showing similar satisfaction rates in other family mediation programs). See generally John R. Phillips, *Mediation as One Step in Adversarial Litigation: One Country Lawyer's Experience*, 2002 J. DISP. RESOL. 143 (refuting conclusions of another author that mediation of disputes results in client dissatisfaction).

⁵⁷ Kelly, *supra* note 56, at 17.

⁵⁸ Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 58 (2004). The author of the article did not report the data in specific percentages.

⁵⁹ E. Franklin Dukes, *What We Know About Environmental Conflict Resolution: An Analysis Based on Research*, 22 CONFLICT RESOL. Q. 191, 199 (2004).

⁶⁰ D'Alo, *supra* note 38, at 221-22; see also Cynthia F. Cohen & Murray E. Cohen, *Relative Satisfaction with ADR: Some Empirical Evidence*, DISP. RESOL. J., Nov. 2002-Jan. 2003, at 37, 38-40 (suggesting that studies of student satisfaction with six types of ADR processes may also reflect the preference of actual users of ADR for processes giving them control of the process and the outcome).

⁶¹ See generally Robert W. Rack, Jr., *Thoughts of a Circuit Court Mediator on Federal Court-Annexed Mediation*, 17 OHIO ST. J. ON DISP. RESOL. 609, 625 (2002)

grievances and malpractice claims filed against mediators indicate that dissatisfied parties simply “lump it.”⁶²

B. Malpractice Suits Filed Against Mediators in Courts

Twenty years ago, Jay Folberg and Alison Taylor’s research indicated that “[t]here are very few claims against mediators and no reported cases in which a mediator has been successfully sued for damages regarding mediation services.”⁶³ A few years later, in one of the leading ADR textbooks, Len Riskin and James Westbrook reassured new mediators that “[t]he risk of a successful lawsuit for professional negligence (malpractice) is

(“Historically, complaints to [the U.S. Court of Appeals for the Sixth Circuit] of which I am aware have been rare, maybe a half dozen in 20 years.”); Wissler, *What We Know*, *supra* note 8, at 645 n.11, 661, 663 (based on questionnaires completed by mediators, parties, and attorneys in 1,730 cases referred to mediation between 1992 and 2000, “[a] majority of the litigants not only felt the mediation process was fair (72%), but that they had a sufficient chance to tell their views of the dispute (84%) and also had considerable input in determining the outcome (63%).” Eighty-nine percent of attorneys thought the mediation process was very fair.); Jennifer Shack, *Mediation in Courts can Bring Gains, but Under What Circumstances*, DISP. RESOL. MAG., Winter 2003, at 11 *passim* (summarizing research showing that 70% of parties are satisfied with the mediation process).

⁶² “‘Lumping it’ means that an individual knows they [sic] have a problem but for strategic reasons chooses not to bring it up to another party. This can be a form of submission, or it can be a part of a larger interaction in which the possible gain is not worth the possible loss.” Jessie Dye, *Mediation: Win-Win Alternatives for Conflict Resolution*, 4 IN CONTEXT 29 (1997), available at <http://www.context.org/ICLIB/IC04/Dye.htm>. See generally William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 632–33 (1980–81) (“[T]oo few wrongs are perceived, pursued, and remedied . . . [T]he capacity of people to tolerate substantial distress and injustice . . . may represent a failure to perceive that one has been injured; such failure may be self-induced or externally manipulated.”); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 14 (1983) (“Even where injuries are perceived, a common response is resignation, that is, ‘lumping it.’”); Martha Minnow, *Speaking of Silence*, 43 U. MIAMI L. REV. 493, 493 (1988) (book review) (“There are real costs to complaining. There may also be a kind of survival strategy in swallowing injury, or ‘lumping it.’ To respond to hurt with silence, however, leaves the source of hurt unchallenged. This is the insight behind the satirist’s invocation: ‘Will all those who feel powerless to influence events please signify by maintaining their usual silence.’”).

⁶³ JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 280 (1984).

extremely remote. Plaintiffs would have difficulty establishing not only the standard of care but also causation and damages.”⁶⁴

As recently as 1999, Stephen B. Goldberg, Frank E. A. Sander and Nancy H. Rogers stated:

More frequently, no remedy has been specified for a breach of the mediator’s duty. Where no remedy is provided, the laws presumably would be enforced through civil actions, filed by those harmed if the mediator fails to comply. However, there are no reported judgments against mediators and few reports of suits.⁶⁵

Michael Moffitt, in the most thoroughly researched work to date, found the following:

As an empirical matter, mediators have enjoyed almost absolute freedom from lawsuits alleging injury stemming from mediation conduct. Reported cases in U.S. federal courts, in U.S. state courts, and in the court systems of Canada, Britain, Australia, and New Zealand include only one case in which a mediator was found liable to a party for mediation conduct. [In that case,] the defendant mediator successfully appealed the jury award [M]ediation association newsletters, academic journals, and on-line resources reveal no [mediator malpractice] cases. Even malpractice insurers, who do an apparently healthy business providing insurance to mediators annually, report very few claims against those policies.⁶⁶

In a paragraph that helps frame my thinking on the subject, Moffitt continued:

The lack of successful suits against mediators, however, does not mean that mediators never injure their clients through substandard mediation practices [In most states, few] quality control mechanisms exist to deter substandard practices. There are no licensure systems, no stringent

⁶⁴ LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 214 (1987).

⁶⁵ STEPHEN B. GOLDBERG, FRANK E. A. SANDER & NANCY H. ROGERS, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 204 (3d ed. 1999).

⁶⁶ Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 150–51 (2003) [hereinafter *Suing Mediators*]; see also Nat’l Ass’n for Cmty. Mediation, *NAFCM Practice Notes: Liability in Mediation*, COMMUNITY MEDIATOR, Spring 2000 (on file with author); Joyce F. Clough & Charlene R. Foss, *Claims Against Arbitrators and Mediators Are on the Rise* (Sept. 2004) (unpublished article on file with Complete Equity Markets, Inc., 1098 S. Milwaukee Ave., Wheeling, IL 60090, (800) 323-6234) (on file with author) (describing claims handled by leading mediation malpractice insurer).

barriers to entry into the practice, and little public insight into the mediation process We must assume that mediators are making mistakes.⁶⁷

He continues by noting that the favorable statistics fail to provide the kind of comfort experienced mediators seek.

[M]ediators are increasingly concerned about liability. In mediation trainings, for example, participants demand to spend an increasing percentage of time considering the possibility of liability. The interest in liability is even more pronounced among experienced practitioners [M]ediators still seem to experience the prospect of liability more as a terrible lottery than a specific deterrent.⁶⁸

In short, we know that mediators commit malpractice, engage in conduct inconsistent with standards of practice, or violate core values of mediation. Yet, the majority of states do not help mediators to “name” the misconduct or aggrieved parties to claim it.⁶⁹

I have asked experienced mediators why they, of all mediators, may be more concerned about the remote, but nonetheless real, prospect that a dissatisfied party will file a professional grievance or malpractice claim against them. They offer several explanations. First, experienced mediators have found themselves in situations raising serious ethical issues that they were not certain how to handle. Simply by being in the field for some time, they know how often they face ethical dilemmas. Experienced mediators have also gained enough familiarity with general ethical principles by that point in their careers that they can more easily recognize when they are facing an ethical dilemma.⁷⁰

⁶⁷ *Suing Mediators*, *supra* note 66, at 151.

⁶⁸ *Id.* at 185 n.130, 186 n.132.

⁶⁹ For a discussion of “claiming” behavior, see Felstiner, *supra* note 62, at 635–36 (“The third transformation occurs when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy. We call this communication *claiming*.”) (emphasis in original).

⁷⁰ In states requiring ethics training, the training often occurs as a one or two hour addition to the already crowded basic mediator training curriculum. The trainers often teach the subject hurriedly, by a lecture method, to students who have no context for the discussion because they have not yet conducted a real mediation. In addition, in states that do not have an ethics code, trainers must decide which aspirational ethics code they should offer to students. *See, e.g.*, Mediation Training, Missouri University Office of Continuing Legal Education & The Center for the Study of Dispute Resolution (June 5–7, 2005) (providing 20.4 hours of Missouri MCLE, including 1 hour of ethics training).

Second, therapist-mediators admit that many litigated conflicts involve narcissists and borderline personalities.⁷¹ These parties actually enjoy conflict and hold grudges. They put people into friend and enemy camps. Therefore, it is easy for the mediator to slip into the enemy camp.⁷² Therapist-mediators reasonably expect highly litigious persons with personality disorders to target the mediator in their next lawsuits.⁷³

Third, mediators often practice with parties who are participating in the mediation without lawyers. In Florida, Mel Rubin asserts that *pro se* parties file 50 percent of the cases.⁷⁴ Thus, mediators will see many of these unrepresented parties in court-ordered mediation.⁷⁵ Greg Firestone has heard

⁷¹ When I mentioned this factor at two recent ethics training sessions, therapists in the room started to nod their heads in agreement.

⁷² See WILLIAM A. EDDY, *HIGH CONFLICT PERSONALITIES: UNDERSTANDING AND RESOLVING THEIR COSTLY DISPUTES passim* (2003).

⁷³ Rubin & McGirney, *supra* note 54.

⁷⁴ Sharon Press, Director of the Florida Dispute Resolution Center (DRC), believes that perhaps 50% of domestic cases involve *pro se* parties in Florida, not 50% of all civil cases. Telephone Interview with Sharon Press, Director of Florida's DRC, in Tallahassee, Fla. (Nov. 25, 2005).

⁷⁵ *Id.* Rubin has served as a member of the Supreme Court of Florida's ADR Policy Committee, teaches as an adjunct professor at the University of Miami Law School, and is a certified mediator in Florida. He is not a member of the Florida bar. See Mediation Services Inc, About Mel Rubin, <http://www.mediate.com/melrubin/pg1.cfm>. Rubin has not supported this statement with empirical research and he has not responded to my efforts to discuss the support for this statement. Sharon Press, Director of the Florida DRC, believes most parties ordered to court-connected mediation sessions are represented by counsel. Telephone Interview with Sharon Press, Director of the Florida DRC, in Tallahassee, Fla. (Mar. 28, 2005). See Connie J. A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCH. PUB. POL'Y & L. 989, 993-94 (2000) (citing two studies in Maricopa County, Arizona, two studies of California courts, and a study of 16 courts nationwide indicating that in divorce and child custody mediations held since 1992, 72% to 90% of the mediations involved one *pro se* party; and 35% to 56% of the mediations involved two *pro se* parties); Deborah R. Hensler, *supra* note 8, at 133 (citing research showing that lawyers generally participate in mediations with their clients); Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1362 n.261 (1995) (analyzing data assembled by the National Center for State Courts and finding that lawyers played no role in mediation in 43 percent of the 205 court-related divorce mediation programs studied); see also Katherine R. Kruse, *Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation*, 8 CLINICAL L. REV. 405, 414 n.19 (2002) (citing two sources reporting that up to 88% of family law cases, not necessarily in mediation, involve one *pro se* party; also reporting that 69% to 72% of Wisconsin cases filed in an urban area court involved at least one *pro se* party). Thus, Rubin and

that 80 percent of people in family related mediations are appearing *pro se*.⁷⁶ *Pro se* parties, these mediators suggest, may have a more difficult time analyzing the fairness of the settlement outcome. They may also have a more difficult time analyzing the integrity of the mediation process. Without the analytical skills and professional experience of lawyers, *pro se* parties may feel less satisfied with the outcome or the process and so more inclined to sue the mediator or file a professional grievance or complaint.⁷⁷

Fourth, experienced mediators know the pressures of the marketplace. Mel Rubin describes the typical situation.⁷⁸ The mediator gets a call from a lawyer who says he wants a case evaluation. The mediator knows that the type of neutral service the lawyer expects may (or does) violate the ethical code of conduct for mediators in that state. The mediator says he cannot (or will not) provide that particular service in the context of mediation. The lawyer responds: "But Donna down the road does it all the time for us. I guess I need to call her." It becomes increasingly more difficult for mediators trying to make a living to resist these invitations. Rubin calls this the point where "ethics meet the marketplace."⁷⁹

In short, despite the data, mediators increasingly feel the risk of malpractice suits or of grievances filed with mediation program administrators, state bar associations, or the entities regulating a mediator's profession of origin.⁸⁰ Effective and well-designed grievance systems can

Firestone seem to assume that parties who participate in a suit *pro se* do not retain attorneys when a court orders them to attempt a mediated settlement of the dispute.

⁷⁶ Firestone, *supra* note 54.

⁷⁷ Wissler, *What We Know*, *supra* note 8, at 696–701. For a review of research on the effects of process features on parties' perceptions of procedural justice, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?* 79 WASH. U. L.Q. 787, 789 (2001) [hereinafter Welsh, *Making Deals*] (demonstrating that mediation's adoption of attorney dominance of the process, evaluative interventions, marginalization or abandonment of joint sessions, and a focus on monetary settlements represents a successful adaptation of the process to the needs of "litigotiation," but arguing that mediation should offer disputants an experience of procedural justice that is generally inconsistent with these types of interventions).

⁷⁸ Rubin & McGirney, *supra* note 54.

⁷⁹ *Id.*

⁸⁰ I use the term "profession of origin" to describe any other professional competencies a mediator may have that would subject him or her to a different set of ethical standards, including the professions of lawyers, therapists, psychologists, social workers, accountants, or physicians. One issue that falls beyond the scope of this article is whether other ethics codes may apply when a mediator is a member of one or more professions. Martin's response to Clare's Findlaw posting, *supra* notes 2, 4, raises this issue. Even in a state like Kentucky that has no mediator ethics rules, the lawyer-mediator

divert some potential mediator malpractice suits into grievance processes that may satisfy both the unhappy party and the mediator, will enhance mediator skill, will allow for de-rostering of incompetent mediators, will protect the mediation process, and will protect the reputation of the field and of referring courts. As Sharon Press, Director of the Florida Dispute Resolution Center (DRC), recently said: "It is irresponsible to divert parties into court-connected mediation programs without providing a process by which they can get help if the process is handled improperly."⁸¹

C. Complaints Filed Against Mediators Working in Court-Connected Programs

Only seven states operate mediator grievance systems.⁸² Depending on the system, they apply to civil and family mediators operating in court-connected mediation programs or to mediators that the courts or their program administrators have certified, registered, or rostered.⁸³ The systems

may still be governed by the ethics code governing lawyers. A therapist-mediator may end up defending a grievance filed under ethical rules applying to therapists. In Virginia, for instance, the Standards of Ethics expressly state:

These Standards are not intended to be exclusive and do not in any way limit the responsibilities the mediator may have under codes of ethics or professional responsibility promulgated by any other profession to which the mediator belongs or to any other code of ethics or professional responsibility to which the mediator subscribes, such as those promulgated by the Society of Professionals in Dispute Resolution or the Academy of Family Mediators.

VIRGINIA SOEs, *supra* note 48, § P.

⁸¹ Telephone Interview with Sharon Press, *supra* note 74.

⁸² After the publication deadline for this article, the author discovered that Arkansas and South Carolina also had complaint systems. *See* discussion *supra* notes 13–15 and accompanying text. The complaint data for North Carolina and Arkansas appears in Appendices H and I, respectively, and are not discussed in the text of this article.

⁸³ Michigan and New Hampshire have established procedures to process complaints against family law mediators. *See* MICH. COMP. LAWS ANN. § 552.526 (West 2005); N.H. REV. STAT. ANN. § 328-C:7 (2004); *see also* Kimberlee K. Kovach, *Enforcement of Ethics in Mediation*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 111 (Phyllis Bernard & Bryant Garth eds., 2002). *See generally* NATIONAL STANDARDS, *supra* note 8, § 2.6 (recommending that "[p]arties referred by the court to a mediation program, whether or not it is operated by the court, should have access to a complaint mechanism to address any grievances about the process."). The Director of the Florida Court Management and Dispute Resolution Center, Michael Bridenback, who brought his experience in drafting the Florida ethics standards, and the Executive Secretary of the

vary in their level of formality, the complaint intake, review, and investigation procedures, the structure of the hearing and appeal process, the composition of the reviewing panels, the discretion of the directors of the programs to determine the facial sufficiency of informal and formal complaints⁸⁴ filed against mediators, the ability of the reviewing bodies to compel testimony and the appearance of witnesses, the nature of the possible sanctions, and the process for imposing sanctions.

1. Complaints Filed Against Florida Mediators

Florida's 2000 census data show a population of nearly 16 million people, making it the most populous state analyzed.⁸⁵ As of December 2005, over 18,000 people had completed certified mediation training programs.⁸⁶ In August 2005, 1,391 county mediators, 1,682 family mediators, 2,166 circuit mediators, and 138 dependency mediators operated as certified mediators in the state.⁸⁷ Sharon Press, the Director of Florida's DRC, estimates that courts refer over 100,000 cases a year to mediation.⁸⁸ From May 1992 to April

Virginia Supreme Court, Robert N. Baldwin, served on the Advisory Board at the time the board developed the National Standards. *Id.* at iii. It should come as no surprise that Florida and Virginia are among the five states that have ethics codes that reflect the values found in the National Standards, including the complaint mechanism recommended in section 2.6.

⁸⁴ In most of the states analyzed in this article, the complaint procedures require a signed, written complaint. Some procedures require the complaining party to certify that the facts stated in the complaint are believed to be true. Informal complaints fail to meet these standards.

⁸⁵ U.S. Census Bureau, State & County QuickFacts, <http://quickfacts.census.gov/qfd/states/12000.html> (last visited Mar. 2, 2006).

⁸⁶ Florida State Courts, Alternative Dispute Resolution, http://www.flcourts.org/gen_public/adr/adrintro.shtml (last visited Mar. 2, 2006).

⁸⁷ *Id.*

⁸⁸ Diane Kenty, Sharon Press & Leila Taaffe, Session 3.19 on *Responding to the Unhappy Consumer* at the ACR Third Annual Conference, The World of Conflict Resolution: A Mosaic of Possibilities (Orlando, Fla. Oct. 15–18, 2003) (transcript on file with author) [hereinafter Conference Transcript]. I thank the Association for Conflict Resolution for its permission to quote from the Conference Transcript.

In November 2004, the Florida Supreme Court advised the Florida legislature that the court system, based on accepted objective formulas, needed 67 new circuit court judges, 41 new county court judges, and 2 additional appellate court judges. *In re: Certification of Need for Additional Judges*, 889 So. 2d 734, 740–41 (Fla. 2004). Since 2000, the legislature had authorized less than 20% of the trial judges requested by the court. It has authorized no new trial judges in the past two years, and no new county court judges in the past three years. *Id.* at 737, 738. The court noted, however, that 50% of its

2005, the DRC processed 74 grievances against certified mediators.⁸⁹ Accordingly, an individual mediator's risk that he or she will have to defend a grievance complaint in Florida remains extremely low.

civil docket involved the needs of children and families, including juvenile and dependency cases. *Id.* at 736. Of the ten most populous states, Florida ranked second in the case filings per judge, with general district court judges handling 46.5% more filings than the average judge nationally. *Id.* at 737. Court dockets swell during the winter months when the state's population also swells. The courts spend increasing time and resources accommodating the language needs of the large Latino-American population in the state. And the state's aging population puts unique demands on the court system. *Id.* at 737-38. In a three-year period, 1999-2003, labor intensive non-capital murder cases increased 31%. *Id.* at 738. In the past decade, cases involving domestic violence increased 100%. *Id.* In the same three-year period, county court filings, exclusive of traffic infractions, increased 11%. *Id.* The court believes it can protect the rights of due process and equal protection and provide access to the courts for parties when the ratio of appellate judges to circuit judges remains at or below a one to nine ratio. *Id.* at 742. In one appellate circuit, the ratio stood at 1 to 11 in 2004 and cases per appeals judge approximated 441 cases per year. In the 2003-2004 fiscal year, persons filed 24,157 cases in the district courts, an 11% increase over the 1999-2000 fiscal year filings. *Id.* These statistics suggest why Florida courts increasingly rely on mediation to handle court dockets.

⁸⁹ A summary of the complaints filed against Florida mediators and their resolution appears in Appendix C to this article [hereinafter Summary of Florida DRC Formal Complaints]. Sharon Press, the Director of Florida's DRC, provided the summaries of the grievances and their resolutions. See E-mail from Sharon Press, Director of Florida's DRC, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Oct. 3, 2005, 10:50 EST) (on file with the author). The Director of Florida's DRC summarized the complaint handling process in Sharon Press, *Standards . . . Results: Florida Provides Forum for Grievances Against Mediators*, DISP. RESOL. MAG., Spring 2001, at 8 *passim* (analyzing 49 complaints that had been filed since 1992). The original data, compiled by the Florida DRC, consists of the following: "Mediator Qualifications Board Grievances Filed Pre-October 1995 Summary," "Mediator Qualifications Board Grievances Filed October 5, 1995-March 31, 2000 Summary," and "Mediator Qualifications Board Grievances Filed April 1, 2000-Present Summary" (on file with author). Florida's DRC received the first grievance against a mediator in July 1993. Telephone Interview with Sharon Press, Director of Florida's DRC, in Tallahassee, Fla. (Aug. 12, 2005). The complaints summarized in Appendix C may refer to earlier versions of the current Standards of Conduct, discussed *infra* notes 296-301. They may also reflect a different numbering system for the Standards of Conduct. The footnotes to this article refer to the current versions of the Florida Standards of Conduct. Summary of Florida DRC Formal Complaints, *supra*. Florida's DRC staff also processes complaints involving the moral character of applicants and persons seeking recertification. This article does not discuss these complaints, with the exception of three. In one situation, the regulators took the mediator off the court's roster of approved mediators. See discussion *infra* note 111 and accompanying text. In the remaining two complaints, the mediator made misstatements on his application for certification or in his continuing education reporting form that

In 13 of the 74 complaints, the complaint committees⁹⁰ found that the complaint was facially insufficient. They determined that the facts, even if taken as true, did not state an ethical violation under the Florida Rules for Certified and Court-Appointed Mediators.⁹¹ Complaint committees dismissed another 21 complaints for lack of probable cause.⁹² A hearing panel⁹³ heard and dismissed one complaint.⁹⁴ The complainants dismissed three of the grievances, typically after meeting with the mediator and the complaint committee members. The complaint committees dismissed the remaining complaints for various reasons, such as lack of jurisdiction (3 complaints), non-compliance of the complaint with the filing requirements (1 complaint), or after the parties successfully resolved the matter in an informal meeting (11 complaints). Florida regulators imposed sanctions on 12 mediators. Another six mediators agreed to remedial measures that included making an apology, accepting oral reprimands or admonishments, agreeing to attend additional training programs, gaining experience by working with a supervising mediator, and accepting a written reprimand. As of April 2005, complaint committees were handling five pending complaints.⁹⁵ Thus, of the 69 complaints the DRC had processed through April 2005, about 25 percent of them resulted in a sanction or remedial action against the mediator. In 20 complaints handled, the complaint committees have imposed no sanctions, finding instead that the complaints

possibly reflected on the mediator's integrity under Rule 10.620 of the Florida Standards of Conduct. See discussion *infra* note 102.

⁹⁰ The complaint committees, assembled by the DRC from members of the Mediator Qualifications Board, are described *infra* note 273 and accompanying text.

⁹¹ FLA. STANDARDS OF CONDUCT, *supra* note 48, R. 10.200–10.690.

⁹² The Director of Florida's DRC explains that this finding typically comes after the complaint committee or an independent investigator discovers that the facts are inconsistent with the facts stated in the complaint. The investigated facts indicate that the mediator has not violated an ethics rule. The Director of Florida's DRC gives the following example. A complaint came in to Florida's DRC alleging the following:

This was horrible. I was in this mediation for ten hours. The mediator would not let us break. I wasn't allowed to eat. I was hypoglycemic. . . . I would [have] sign[ed] anything . . . just get me out of that room. We did a whole investigation into it and it turns out that the person said, "Well, you know, actually we really did get to eat, but it just wasn't a very good meal."

Conference Transcript, *supra* note 88, at 15.

⁹³ The hearing panels are described *infra* notes 274–76 and accompanying text.

⁹⁴ Summary of Florida DRC Formal Complaints, *supra* note 89.

⁹⁵ *Id.*

were facially insufficient, finding no probable cause to take the next step in the process, or dismissing the complaints for other reasons.

Florida parties most often alleged⁹⁶ that a mediator interfered with the party's self-determination. Twenty-four of the complaints claimed that a mediator interfered with the parties' self-determination⁹⁷ and another 25 complaints alleged that mediators gave improper professional advice or opinions.⁹⁸ The second most common allegation asserted that a mediator was

⁹⁶ Each complainant may have alleged a violation of several standards of conduct. In addition, Florida's DRC staff may also refer to the complaint committee a violation of a standard that the staff member sees as "embedded" in the facts of the alleged in the complaint. Telephone Interview with Sharon Press, *supra* note 89.

⁹⁷ See generally FLA. STANDARDS OF CONDUCT, *supra* note 48. The rules took effect in May 1992. Telephone Interview with Sharon Press, *supra* note 89. Several provisions of the Standards of Conduct govern party self-determination. "The ultimate decision-making authority . . . rests solely with the parties." FLA. STANDARDS OF CONDUCT, *supra* note 48, R. 10.220. "The purpose of mediation is to provide a forum for consensual dispute resolution by the parties. It is not an adjudicatory process. Accordingly, a mediator's responsibility to the parties includes honoring their right of self-determination; acting with impartiality; and avoiding coercion, improper influence, and conflicts of interest." *Id.* R. 10.300.

(a) Decision-making. Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination. (b) Coercion Prohibited. A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation. (c) Misrepresentation Prohibited. A mediator shall not intentionally or knowingly misrepresent any material fact or circumstance in the course of conducting a mediation. (d) Postponement or Cancellation. If, for any reason, a party is unable to freely exercise self-determination, a mediator shall cancel or postpone a mediation.

Id. R. 10.310(a)-(d). "A mediator shall . . . encourage the participants to conduct themselves in a collaborative, non-coercive, and non-adversarial manner." *Id.* R. 10.410. For a discussion about the evolution of these rules on self-determination in Florida, see Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 34-52, App. (2001) [hereinafter Welsh, *Thinning Vision*].

⁹⁸ The Standards of Conduct provide:

(a) Providing Information: Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide. (b) Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal advice. (c) Personal or Professional Opinion. A mediator shall not offer a personal or professional opinion intended to coerce the

not impartial.⁹⁹ Thirty of the grievances specified this violation.¹⁰⁰ Parties alleged improper continuation, adjournment, or termination of the mediation in 14 complaints.¹⁰¹ Complainants alleged lack of mediator integrity in 11 complaints.¹⁰² In eight grievances, complainants stated that the mediator failed to conduct an appropriate orientation session before beginning the

parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination[,] however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

FLA. STANDARDS OF CONDUCT, *supra* note 48, R. 10.370(a)–(c).

⁹⁹ The Standards of Conduct provide:

(a) Generally. A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual. (b) Withdrawal for Partiality. A mediator shall withdraw from mediation if the mediator is no longer impartial. (c) Gifts and Solicitation. A mediator shall neither give nor accept a gift, favor, loan, or other item of value in any mediation process. During the mediation process, a mediator shall not solicit or otherwise attempt to procure future professional services.

Id. R. 10.330(a)–(c). The Director of Florida's DRC reported:

They're not impartial . . . [I]t . . . shows [up as an allegation] in almost every single complaint that we get. Even if there are other complaints . . . it seems to be the thing that drives someone to say, "You know what, I'm really angry about what happened in the process." They'll forgive lots of stuff, but that's the one that really sticks with them . . .

Conference Transcript, *supra* note 88, at 11–12.

¹⁰⁰ Summary of Florida DRC Formal Complaints, *supra* note 89.

¹⁰¹ The Standards of Conduct provide:

Adjournment or Termination. A mediator shall: (1) adjourn the mediation upon agreement of the parties; (2) adjourn or terminate any mediation which, if continued, would result in unreasonable emotional or monetary costs to the parties; (3) adjourn or terminate the mediation if the mediator believes the case is unsuitable for mediation or any party is unable or unwilling to participate meaningfully in the process; (4) terminate a mediation entailing fraud, duress, the absence of bargaining ability, or unconscionability; and (5) terminate any mediation if the physical safety of any person is endangered by the continuation of mediation.

FLA. RULES FOR MEDIATORS, *supra* note 48, R. 10.420(b).

¹⁰² "A mediator shall not accept any engagement, provide any service, or perform any act that would compromise the mediator's integrity or impartiality." *Id.* R. 10.620. "A mediator's business practices should reflect fairness, integrity and impartiality." *Id.* R. 10.300.

main sessions.¹⁰³ Other alleged violations included: conflicts of interest (five complaints),¹⁰⁴ excessive fees and expenses (four complaints),¹⁰⁵ failure to maintain confidentiality (four complaints),¹⁰⁶ demeanor not befitting a

¹⁰³ The Standards of Conduct provide:

Orientation Session. Upon commencement of the mediation session, a mediator shall describe the mediation process and the role of the mediator, and shall inform the mediation participants that: (1) mediation is a consensual process; (2) the mediator is an impartial facilitator without authority to impose a resolution or adjudicate any aspect of the dispute; and (3) communications made during the process are confidential, except where disclosure is required by law.

Id. R. 10.420(a).

¹⁰⁴ The Standards of Conduct provide:

(a) Generally. A mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest. A conflict of interest arises when any relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator's impartiality (d) Conflict During Mediation. A mediator shall not create a conflict of interest during the mediation. During a mediation, a mediator shall not provide any services that are not directly related to the mediation process.

Id. R. 10.340(a), (d).

¹⁰⁵ The Standards of Conduct provide:

(a) Generally. A mediator holds a position of trust. Fees charged for mediation services shall be reasonable and consistent with the nature of the case (c) Written Explanation of Fees. A mediator shall give the parties or their counsel a written explanation of any fees and costs prior to mediation (e) Remuneration for Referrals. No commissions, rebates, or similar remuneration shall be given or received by a mediator for a mediation referral. (f) Contingency Fees Prohibited. A mediator shall not charge a contingent fee or base a fee on the outcome of the process.

Id. R. 10.380(a), (c), (e), (f).

¹⁰⁶ The Standards of Conduct provide:

(a) Scope. A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required by law. (b) Caucus. Information obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party. (c) Record Keeping. A mediator shall maintain confidentiality in the storage and disposal of records and shall not disclose any identifying information when materials are used for research, training, or statistical compilations.

Id. R. 10.360(a)–(c).

MEDIATOR COMPLAINT SYSTEMS

mediator (three complaints),¹⁰⁷ improper advertising practices (two complaints),¹⁰⁸ lack of professional competence (two complaints),¹⁰⁹ and unfair scheduling practices (two complaints).¹¹⁰

The complaint committees most frequently imposed, in 11 of 17 cases, a sanction requiring the mediator to get further training. The sanction included requirements for advanced mediation training, attendance at a dispute resolution conference, communications sensitivity training, communication and listening training, family mediation training, domestic violence training, and ethics training. Three mediators also accepted sanctions requiring them to observe mediations conducted by certified mediators. Three mediators agreed to mediate or co-mediate under the observation and supervision of a certified mediator. In eight cases, the complaint committees suspended the mediators from conducting mediations or certain types of mediations until they had completed the imposed sanction. When one mediator failed to satisfy the agreed sanction, the mediator was de-certified subject to reinstatement by petition no earlier than two years after the date of the imposed sanction.¹¹¹ In five cases, the complaint committees required

¹⁰⁷ "A mediator shall be patient, dignified, and courteous during the mediation process." *Id.* R. 10.350.

¹⁰⁸ "A mediator shall not engage in marketing practices which contain false or misleading information. A mediator shall ensure that any advertisements of the mediator's qualifications, services to be rendered, or the mediation process are accurate and honest. A mediator shall not make claims of achieving specific outcomes or promises implying favoritism for the purpose of obtaining business." *Id.* R. 10.610.

¹⁰⁹ "A mediator shall acquire and maintain professional competence in mediation. A mediator shall regularly participate in educational activities promoting professional growth." *Id.* R. 10.630.

¹¹⁰ "The benefits of the process are best achieved if the mediation is conducted in [a] . . . timely fashion." *Id.* R. 10.400. "A mediator shall schedule a mediation in a manner that provides adequate time for the parties to fully exercise their right of self-determination. A mediator shall perform mediation services in a timely fashion, avoiding delays whenever possible." *Id.* R. 10.430.

¹¹¹ This complaint related to the good moral character of a lawyer-mediator who had an alcohol abuse problem and a history of criminal convictions for assault. After the first hearing, the hearing panel required the mediator to comply with the Florida Lawyer Assistance Contract and to do additional training and mentorship. Florida's DRC staff learned the mediator had not completed all of the sanctions. The hearing panel held a second hearing confirming the mediator's failure to comply with all of the sanctions and then decided to de-certify the mediator. Telephone Interview with Sharon Press, *supra* note 89. This grievance, and the resulting sanction, does not appear in Appendix C to this article because it did not involve a violation of the Florida Standards of Conduct. *Id.* I include it in the discussion to show how infrequently Florida takes a mediator off the roster of court-approved mediators. It also illustrates the procedural safeguards Florida

mediators to adjust their fees by waiving them or forgiving unpaid fees or refunding fees charged in the mediation in which the violation occurred. They gave oral reprimands or admonishments to three mediators and a written reprimand to one mediator. Mediators also provided apologies in three cases. One sanction imposed by a complaint committee required the mediator to pay the cost of the complaint committee's investigation. Another sanction required the mediator to write an article on confidentiality and good faith in mediation and on the limitations the ethics rules imposed on reports to judges about the mediation. In one case, as follow-up to the imposed sanction, the DRC required the mediator, before mediating again, to submit a copy of the mediator's engagement letter along with its explanation of the fees charged.¹¹²

2. Complaints Filed Against Virginia Mediators

Virginia, with less than half the population of Florida,¹¹³ has approximately 1000 certified mediators providing services to its citizens.¹¹⁴ Geetha Ravindra, the Director of the Virginia Department of Dispute Resolution Services (DRS),¹¹⁵ estimates that the Virginia courts refer 10,000 cases to mediation each year.¹¹⁶ Since 1992, her office has received 68

uses before imposing this sanction. In contrast, in Maine, the investigation of four complaints resulted in the voluntary resignation of four mediators, apparently without a hearing or other due process protections. In another situation, the ADR Director of the Maine program removed a mediator from the court's roster when she observed a violation of the state's ethics standards. Apparently, she imposed the sanction without conducting a hearing or providing other procedural safeguards. However, the mediator did not appeal the sanction. *See* discussion *infra* notes 178, 758 and accompanying text.

¹¹² Summary of Florida DRC Formal Complaints, *supra* note 89.

¹¹³ U.S. Census Bureau, State & County QuickFacts, <http://quickfacts.census.gov/qfd/states/51000.html> (7,078,515 people in 2000) (last visited Mar. 2, 2006).

¹¹⁴ *See* discussion *infra* note 399.

¹¹⁵ The Virginia Supreme Court supervises this department and Ms. Ravindra reports to the Executive Secretary of the Virginia Supreme Court (Executive Secretary). Telephone Interview with Geetha Ravindra, Director of the Virginia Department of Dispute Resolution Services (DRS) in Richmond, Va. (July 22, 2005). The Executive Secretary's responsibilities are described *infra* note 401.

¹¹⁶ Geetha Ravindra, Director of the DRS in Richmond, Va., Complaint Procedures for Mediators Overview at the Virginia Mediation Network Spring Conference (April 2005) at slide 15 (on file with author) [hereinafter DRS Director's Presentation]. Telephone Interview with Geetha Ravindra, *supra* note 115.

informal grievance complaints against mediators.¹¹⁷ In 55 of those situations, the complaining party did not file a formal complaint. Of the remaining 13 complaints, 4 fell outside the jurisdiction of DRS because the alleged conduct did not fall within the role of a certified mediator.¹¹⁸ The Mediator Complaint Panel¹¹⁹ dismissed three complaints for failure to state a claim under the Standards of Ethics and Professional Responsibility for Certified Mediators (SOEs).¹²⁰ The Complaint Panel dismissed another three complaints, but with a recommendation that the mediator obtain additional training or mentorship from a more experienced mediator.¹²¹ The Mediator Review Committee¹²² heard two complaints. It dismissed one complaint, again with a recommendation that the mediator obtain additional training or supervised mediation experience. In the other case, it sanctioned the mediator.¹²³ As of April 2005, the Virginia Supreme Court has not taken any mediator off its certified mediator roster based on a grievance complaint.¹²⁴

Parties filing informal or formal complaints in Virginia most often complain that the mediator was partial to the other party or lawyer.¹²⁵ Thirty-

¹¹⁷ DRS Director's Presentation, *supra* note 116, at slide 15. A summary of the complaints against Virginia certified mediators appears as Appendix D to this article [hereinafter Virginia DRS Log of Formal Complaints]. See E-mail from Geetha Ravindra, DRS Director, Virginia Supreme Court, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 22, 2005, 15:27 EST) (transmitting Virginia DRS Log of Formal Complaints) (on file with author); see also E-mail from Geetha Ravindra, DRS Director, Virginia Supreme Court, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Apr. 14, 2005, 12:47 EST) (categorizing complaints by nature of complaint) (on file with author).

¹¹⁸ DRS Director's Presentation, *supra* note 116, at slide 15. Telephone Interview with Geetha Ravindra, *supra* note 115.

¹¹⁹ This panel is described *infra* notes 438–42 and accompanying text.

¹²⁰ VA. SOEs, *supra* note 48. The Judicial Council of Virginia adopted the SOEs in June 2002. See Virginia's Judicial System, Standards of Ethics and Professional Responsibility for Certified Mediators, <http://www.courts.state.va.us/soe/soe.htm> (last visited Mar. 2, 2006).

¹²¹ DRS Director's Presentation, *supra* note 116, at slide 15. Telephone Interview with Geetha Ravindra, *supra* note 115.

¹²² This committee is described *infra* notes 460–64 and accompanying text.

¹²³ Virginia DRS Log of Formal Complaints, *supra* note 113. The typical sanction requires continuing education or mentorship. DRS Director's Presentation, *supra* note 116, at slide 17; Virginia DRS Log of Formal Complaints, *supra* note 113; see also discussion *infra* note 470 and accompanying text.

¹²⁴ DRS Director's Presentation, *supra* note 116, at slide 17.

¹²⁵ *Id.* at slide 16; see also E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), *supra* note 117. The Virginia SOEs provide:

five of the 68 informal and formal complaints involved this ethical allegation.¹²⁶ A mediator's efforts to undermine party self-determination served as the basis for another 18 complaints.¹²⁷ Persons also lodged ten

1. A mediator shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality. Impartiality means freedom from favoritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties in moving toward an agreement. 2. A mediator shall avoid conduct which gives the appearance of partiality towards one of the parties. A mediator should guard against partiality or prejudice based on the parties [sic] personal characteristics, background, or performance in the mediation. 3. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

VA. SOEs, *supra* note 48, § G. One complaint also raised an issue about conflict of interest under section H of Virginia's SOEs, which provides:

1. The mediator has a duty to remain free from conflict of interest that could in any way affect the ability of the mediator to conduct a neutral and balanced process. 2. A mediator must disclose any current, past, or possible future representation or relationship with any party or attorney involved in the mediation. Disclosure must also be made of any relevant financial interest. All disclosures shall be made as soon as possible after the mediator becomes aware of the interest or relationship. 3. After appropriate disclosure, the mediator may serve if the parties so desire.

VA. SOEs, *supra* note 48, § H; *see also* VA. RULES OF PROF'L. CONDUCT R. 2.10(d)–(f) (2004) (similar language); E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), *supra* note 117.

¹²⁶ DRS Director's Presentation, *supra* note 116, at slide 16.

¹²⁷ E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), *supra* note 117. Virginia's SOEs provide:

1. Mediation is based on the principle of self-determination by the parties. Self-determination requires that the mediator rely on the parties to reach a voluntary agreement. 2. The mediator may provide information about the process, raise issues, and help explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. 3. The mediator may not coerce a party into an agreement, and shall not make decisions for any party to the mediation process. 4. The mediator shall promote a balanced process and shall encourage the parties to conduct the mediation in a collaborative, non-adversarial manner. 5. Where appropriate, the mediator shall promote consideration of the interests of persons affected by actual or potential agreements who are not present or represented at the mediation.

VA. SOEs, *supra* note 48, § E. In addition, Virginia Rules of Professional Conduct, Rule 2.10(b)(4) further provides that a mediator "may not compel or coerce the parties to make an agreement." This allegation may fall to second place in Virginia, unlike Florida, because the Virginia SOEs expressly permit a mediator to provide legal information and evaluations, at least in three circumstances. *See* VA.'s SOEs, *supra* note 48, § F; VA. RULES OF PROF'L. CONDUCT, *infra* note 128, R. 2.11 (c), (d) (2004); *see also* Carl T.

complaints asserting that the mediator had improperly or incorrectly provided professional information or advice.¹²⁸ Ten more complaints involved

Hahn, *Using Evaluative Techniques: The Virginia Approach*, 16 ALT. TO HIGH COST LITIG. 149, 149 (1998) (describing debate involved in drafting Virginia's SOEs and explaining the informed consent approach adopted that also provides express rules governing evaluative techniques); Laflin, *supra* note 46, at 518 ("The drafters of the Virginia rules thoroughly debated the issue of evaluation, striving to resolve it through what they termed a 'delicate compromise.'").

¹²⁸ DRS Director's Presentation, *supra* note 116, at slide 16. Telephone Interview with Geetha Ravindra, *supra* note 115. Virginia's SOEs provide:

1. The mediator shall encourage the participants to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a participant. 2. A mediator shall give information only in those areas where qualified by training or experience. 3. When providing information, the mediator shall do so in a manner that will neither affect the parties' perception of the mediator's impartiality, nor the parties' self-determination.

VA. SOEs, *supra* note 48, § F; *see also* VA. RULES OF PROF'L CONDUCT R. 2.10(b)(2) & cmt. [3] (2004) (similar language). A Virginia Supreme Court rule, however, confuses the role of the mediator by providing:

(c) A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent (d) A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.

Id. R. 2.11(c), (d) (2004).

Taken together, the Virginia Rules of Professional Conduct for Lawyers and the Virginia SOEs prevent a mediator from offering legal advice, but allow a mediator to provide legal information in specific contexts, and authorize at least three types of case evaluation. Although the issue of the unauthorized practice of law (UPL) is beyond the scope of this article, under the DRS's careful interpretation of Virginia law, UPL occurs when a mediator applies the law to specific facts. *See* Virginia's Judicial System, Guidelines on Mediation & the Unauthorized Practice of Law, <http://www.courts.state.va.us/drs/upl/preface.html> (last visited Mar. 2, 2006). I have concluded that it is nearly impossible to draw a meaningful line between legal advice, legal information, and case evaluation under the interpretation compelled by current Virginia law. Thus, UPL remains a trap for unwary Virginia mediators who believe they have explicit Supreme Court authorization to engage in activities that the Virginia Bar may consider UPL. For other evaluations of the UPL issue, including the latest analysis of the Authorized Practice of Mediation by the ACR Board of Directors, *see* citations *supra* note 52. Ms. Ravindra served on the ACR Task Force that reported its finding to the board of directors. Telephone Interview with Geetha Ravindra, *supra* note 115.

allegations about the poor quality of the process.¹²⁹ The complaints also raised issues about the mediator's poor assessment of the appropriateness of mediation for the case and parties (asserted in 5 complaints),¹³⁰ initiation of the process (asserted in 11 complaints),¹³¹ breaches of confidentiality

The compliant procedures provide: "If the complaint involves a procedure which is a combination of mediation with another dispute resolution process, the scope of review under these procedures is limited to the mediation portion of the proceeding." Office of the Exec. Sec. of the Sup. Ct. of Va., Complaint Procedures for Mediators Certified to Receive Court-Referred Cases, § 1(c) (Mar. 1997) [hereinafter Complaint Procedures], available at <http://www.courts.state.va.us/drs/forms/complaintprocedures2002.pdf>. Thus, a dissatisfied participant could file separate claims under other complaint systems against a mediator engaged in med-arb or case evaluation for any ethical violations committed while conducting ADR processes other than mediation. A mediator, therefore, may defend a complaint before the DRS, as well as, for instance, in the Virginia Bar's Fee Dispute Resolution Program. See Virginia State Bar, Resolution of Fee Disputes, <http://www.vsb.org/feedisputes.html> (last visited Mar. 2, 2006). Virginia does not have an arbitrator complaint process. Telephone Interview with Geetha Ravindra, *supra* note 115.

¹²⁹ DRS Director's Presentation, *supra* note 116, at slide 16. Section L of Virginia's SOEs provides:

1. A mediator shall conduct the mediation diligently and shall not prolong the mediation for purposes of charging a higher fee. 2. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from nondisclosure or fraud by a participant, the mediator shall inform the parties. The mediator shall discontinue the mediation in such circumstances, but shall not violate the obligation of confidentiality.

VA. SOEs, *supra* note 48, § L.

¹³⁰ E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), *supra* note 117. Virginia's SOEs provide:

Prior to agreeing to mediate, and throughout the process, the mediator should determine that: 1. Mediation is an appropriate process for the parties; 2. each party is able to participate effectively within the context of the mediation process; and 3. each party is willing to enter and participate in the process in good faith. If in the judgment of the mediator the conditions specified in (1) through (3) are not met, the mediator shall not agree to mediate or, if the concerns arise after the process has begun, shall consider suspending or terminating the process.

VA. SOEs, *supra* note 48, § C. This section of the Virginia SOEs tracks the requirements of Virginia Rules of Professional Conduct, Rule 2.11(b).

¹³¹ E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), *supra* note 117. Virginia is unique in explicitly requiring a specific set of disclosures by the mediator in the opening statement and/or the agreement to mediate. A portion of these disclosures is now known in Virginia as the "four legals." Failure to make these disclosures serves as

grounds for voiding the settlement agreement reached in mediation. *See* discussion of VA. CODE ANN. § 8.01-576.12 (West Supp. 2005) *infra* note 412 and accompanying text. The Virginia Rules of Professional Conduct, Rule 2.11(e), and section D of Virginia's SOEs require the disclosures. Virginia's SOEs provide:

1. Description of Mediation Process. The **mediator shall** define mediation and describe the mediation process to the parties and their attorneys, if present.

- a) Mediation is a process in which a neutral facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute.
- b) The description of the process **shall** include an explanation of the role of the mediator.
- c) The **mediator shall** also describe his style and approach to mediation. The parties **must** be given an opportunity to express their expectations regarding the conduct of the mediation process. The parties and **mediator must** include in the agreement to mediate a general statement regarding the mediator's style and approach to mediation to which the parties have agreed.
- d) The stages of the mediation process **shall** be described by the mediator.

2. Procedures.

- a) Prior to commencement of the court-referred mediation, the **mediator shall** inform the parties in writing of the following:
 1. The mediator does not provide legal advice.
 2. Any mediated agreement may affect the legal rights of the parties.
 3. Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.
 4. Each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.
- b) In all other cases, the **mediator shall** inform the parties orally or in writing, of the substance of the [disclosures required in 2(a) above].
- c) The **mediator shall** reach an understanding with the participants regarding the procedures which may be used in mediation. This includes, but is not limited to, the practice of separate meetings (caucus) between the mediator and participants, the involvement of additional interested persons, the procedural effect on any pending court case of participating in the mediation process, and conditions under which mediation may be terminated by the mediator.
- d) If the mediation is conducted in conjunction with another dispute resolution process, such as arbitration, and the same neutral conducts both processes, the **mediator must** describe to the parties the procedures to be followed in both processes clearly, prior to entering into the agreement to mediate.

VA. SOEs, *supra* note 48, § D (emphasis added).

(asserted in 5 complaints),¹³² drafting or reaching the agreement (asserted in 4 complaints),¹³³ and advertising (asserted in 2 complaints).¹³⁴

¹³² E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), *supra* note 117. Section I of Virginia's SOEs tracks the statutes governing confidentiality in mediation. See VA. CODE ANN. § 8.01-576.10, -581.22 (West Supp. 2005). Section 8.01-576.22 provides:

All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation which relates to the controversy, including screening, intake and scheduling a mediation, whether made to the mediator or mediation program staff or to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the mediation agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the mediator or mediation program and a party to the mediation for damages arising out of the mediation, (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime, (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct and the neutral to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule. The use of attorney work product in a dispute resolution proceeding shall not result in a waiver of the attorney work product privilege.

Notwithstanding the provisions of this section, in any case where the dispute involves support of the minor children of the parties, financial information, including information contained in the child support guidelines worksheet, and written reasons for any deviation from the guidelines shall be disclosed to each party and the court for the purpose of computing a basic child support amount pursuant to § 20-108.2.

The language of Section 8.01-576.10 is nearly identical, but the statute applies to neutrals and "dispute resolution programs" as defined in section 8.01-576.4. *See also* discussion *infra* notes 415-17 and accompanying text.

¹³³ E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), *supra* note 117. Virginia's SOEs provide:

The mediator has no vested interest in the outcome of the mediation; therefore, the mediator must encourage the parties to develop their own solution to the conflict.

3. Complaints Filed Against Georgia Mediators.

Georgia, with a million more people in the state than Virginia, has 1,400 registered mediators serving the people of its state.¹³⁵ Georgia courts referred 28,681 cases to mediation in fiscal year 2005.¹³⁶ That number of referrals has increased every year. Yet, the Georgia Committee on Ethics¹³⁷ has processed only four formal complaints against mediators since 2002 under its Ethical

The mediator may suggest options for the parties to consider, only if the suggestions do not affect the parties' self determination or the mediator's impartiality. The mediator may not recommend particular solutions to any of the issues in dispute between the parties nor coerce the parties to reach an agreement on any or all the issues being mediated.

Prior to the parties entering into a mediated agreement, the mediator has the obligation to determine that:

- 1) the parties have considered all that the agreement involves and the possible ramifications of the agreement;
- 2) the parties have also considered the interests of other persons who are not parties to the mediation but are affected by the agreement; and
- 3) the parties have entered into the agreement voluntarily.

The mediator shall encourage review of any agreement by independent counsel for each of the parties prior to the mediated agreement being signed by the parties.

If the mediator has concerns about the possible consequences of a proposed agreement or that any party does not fully understand the terms of the agreement or its ramifications, the mediator has the obligation to raise these concerns with the parties. Under circumstances in which the mediator believes that manifest injustice would result if the agreement was signed as drafted, the mediator shall withdraw from the mediation prior to the agreement being signed.

VA. SOEs, *supra* note 48, § J.

¹³⁴ E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), *supra* note 117. Virginia's SOEs provide: "A mediator shall be truthful in advertising and solicitation for mediation." VA. SOEs, *supra* note 48, § N.

¹³⁵ U.S. Census Bureau, State & County QuickFacts, <http://quickfacts.census.gov/qfd/states/13000.html> (8.8 million people) (last visited Mar. 2, 2006).

¹³⁶ E-mail from Christina Petrig, Program Coordinator, Georgia Office of Dispute Resolution, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Oct. 3, 2005, 9:51 EST) (on file with author).

¹³⁷ See generally Georgia Commission on Dispute Resolution, http://www.godr.org/rules_statutes.html (last visited Mar. 2, 2006) for a description of the entities involved in the grievance process.

Standards.¹³⁸ Most of the parties complaining about a mediator do not convert an informal complaint into a formal complaint that complies with the rule.¹³⁹ As noted below, the Director of the Georgia Office of Dispute Resolution (GODR) has referred all formal complaints to the Committee on Ethics as facially sufficient.¹⁴⁰ The Committee on Ethics, however, issued a sanction in response to only one of the four complaints it has handled since 2002.

Of the four formal complaints received, two of the complaints involved allegations of impartiality.¹⁴¹ Two complaints alleged mediator coercion.¹⁴²

¹³⁸ See Georgia Office of Dispute Resolution Complaint Summary in Appendix E; see also GA. ETHICAL STANDARDS, *supra* note 48. The Georgia Supreme Court adopted the Georgia Ethical Standards on Sept. 28, 1995. E-mail from Christina Petrig, Program Coordinator, Georgia Office of Dispute Resolution, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Aug. 10, 2005, 11:17 EST) (on file with author). Ms. Petrig supplied data on post-2002 complaints because the Georgia Office of Dispute Resolution has not kept data on prior complaints in the format requested by the author. In one complaint not appearing in Appendix E, the Committee found mediator misconduct, but issued an advisory opinion rather than sanction the mediator. See Ga. Comm'n on Disp. Resol., Advisory Opinions, available at http://www.godr.org/ethics_info.html. The Committee believed it did not have jurisdiction to sanction the mediator because the conduct leading to the complaint occurred before the Georgia Supreme Court had adopted the Georgia Ethical Standards. See E-mails from Christina Petrig, Program Coordinator, Georgia Office of Dispute Resolution, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Aug. 10, 2005, 10:25 EST & August 10, 2005, 11:17 EST) (on file with author).

¹³⁹ Conference Transcript, *supra* note 88, at 58 (Taaffe commented: "[W]e get people calling in about, 'Well, I want to file a complaint. What do I do?' . . . I bend over backwards to make that information available . . . Most of those people don't follow up . . .").

¹⁴⁰ Taaffe reported: "I will read the complaint enormously broadly because I don't want to be charged with protecting the mediators to the detriment of the public, and we'll send the complaint . . . to the mediator and ask for a written response." Conference Transcript, *supra* note 88, at 28.

¹⁴¹ "A mediator must demonstrate impartiality in word and deed. A mediator must scrupulously avoid any appearance of partiality." GA. ETHICAL STANDARDS, *supra* note 48, R. III(A).

¹⁴² The Georgia Ethical Standards provide:

A. In order for parties to exercise self-determination they must understand the mediation process and be willing to participate in the process. A principle duty of the mediator is to fully explain the process. This explanation should include: (1) An explanation of the role of the mediator as a neutral person who will facilitate the discussion between the parties but who will not coerce or control the outcome D. The mediator must guard against any coercion of parties in obtaining a settlement.

Two complaints alleged that the mediator improperly gave legal advice or a case evaluation.¹⁴³ One complaint alleged breach of confidentiality.¹⁴⁴ One complaint also alleged that the mediator had not properly convened a caucus and had failed to handle the case properly when one party was the victim of domestic violence.¹⁴⁵

In one complaint in which the Committee on Ethics ruled against the mediator after a full hearing, it issued a private letter of reprimand and published an opinion without identifying the names of the complaining party or the mediator.¹⁴⁶ In the other complaints, the Committee on Ethics ruled in favor of the mediator based on the evidence in the complaint, the response to

Id. R. I(A), I(D).

¹⁴³ The Georgia Ethical Standards provide:

A. [The mediator shall provide] . . . (4) An explanation of the fact that the mediator will not give legal or financial advice and that if expert advice is needed, parties will be expected to refer to outside experts . . . (8) An explanation that the parties are free to consult legal counsel at any time and are encouraged to have any agreement reviewed by independent counsel prior to signing . . . E. It is improper for lawyer/mediator . . . to offer professional advice to a party. If the mediator feels that a party is acting without sufficient information, the mediator should raise the possibility of the party's consulting an expert to supply that information.

Id. R I(A), I(E).

¹⁴⁴ The Georgia Ethical Standards provide:

Confidentiality is the attribute of the mediation process which promotes candor and full disclosure Statements made during the conference and documents and other material, including a mediator's notes, generated in connection with the conference are not subject to disclosure or discovery and may not be used in a subsequent administrative or judicial proceeding Information given to a mediator in confidence by one party must never be revealed to another party absent permission of the first party.

Id. R. II. These provisions do not exempt from confidentiality communications needed to prove or defend against a claim of mediator misconduct.

¹⁴⁵ The Georgia Ethical Standards provide:

The mediator is the guardian of the fairness of the process. In that context, the mediator must assure that the conference is characterized by overall fairness and must protect the integrity of the process A mediator may refuse to draft or sign an agreement which seems fundamentally unfair to one party.

Id. R. IV, IV(A). "Mediators are obligated not to undertake cases for which their training or expertise is inadequate." *Id.* R. V.

¹⁴⁶ Telephone Interview with Christina Petrig, Program Coordinator, GODR, in Atlanta, Ga. (July 28, 2005).

the complaint, the investigatory summary, and the surrounding circumstances.¹⁴⁷

4. Complaints Filed Against Minnesota Mediators

Minnesota has a population of approximately 4.9 million people.¹⁴⁸ About 1,000 mediators serve this population, covering a statewide docket of approximately 49,000 family cases and 35,000 major civil cases.¹⁴⁹ Rule 114 of the Minnesota General Rules of Practice requires the parties to participate in ADR for all civil cases, except certain cases expressly exempted.¹⁵⁰

The Minnesota A.D.R. Review Board (ADR Review Board)¹⁵¹ has received 33 complaints against neutrals, one of which was not converted by the complaining party to a formal complaint.¹⁵² Parties lodged complaints

¹⁴⁷ *Id.*

¹⁴⁸ U.S. Census Bureau, State & County QuickFacts, <http://quickfacts.census.gov/qfd/states/27000.html> (2000 census population of 4,919,479) (last visited Mar. 2, 2006).

¹⁴⁹ E-mail from Bridget Gernander, Staff Attorney, Minnesota A.D.R. Review Board, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Aug. 9, 2005, 9:30 EST) (on file with author); E-mail from Bridget Gernander, Staff Attorney, Minnesota A.D.R. Review Board, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 22, 2005, 11:55 EST) (on file with author).

¹⁵⁰ MINN. GEN. R. PRAC. 114 (amended 2005). The rule exempts family law matters involving domestic abuse, contempt actions, or in certain support actions when a public agency is a party to the proceeding. It also exempts guardianship, conservatorship, or civil commitment matters from ADR as well as proceedings in juvenile court. MINN. CODE OF ETHICS, *supra* note 48.

¹⁵¹ The ADR Review Board is described *infra* notes 652, 657 and accompanying text.

¹⁵² Minnesota ADR Review Board Complaint Log, Updated: June 11, 2005, a copy of which appears in Appendix F [hereinafter Minnesota ADR Review Board Complaint Log] (received as an attachment to E-mail from Bridget Gernander (Aug. 9, 2005, 9:30 EST), *supra* note 149.) “Facilitative” neutrals conduct mediations. “Hybrid” neutrals conduct mediation, med-arb, and mini-trial processes and include parenting time expeditors. “Adjudicative/Evaluative” neutrals conduct arbitration, summary jury trials, early neutral evaluation, neutral fact finding, moderated settlement conferences, and consensual Special Magistrate processes. MINN. GEN. R. PRAC. 114.02 (amended 2005). On request of either party or on its own motion, a court may appoint a “parenting time expeditor” to resolve parenting time disputes. MINN. STAT. § 518.1751 (West 1990); *see also* discussion *infra* note 622. Parenting time expeditors are typically engaged in a med-arb process. Telephone Interview with Bridget Gernander, Staff Attorney, Minnesota A.D.R. Review Board, in St. Paul, Minn. (July 27, 2005). A “parenting consultant” is an

against 14 “parenting time expeditors,” 8 complaints against mediators, 7 complaints against “parenting consultants,” 1 complaint against a financial neutral, 1 complaint against an arbitrator, and 1 complaint against a neutral conducting a summary jury trial.

The complaints raised issues under nine sections of the Code of Ethics. The most frequent complaint raised by unhappy participants concerned the “Quality of the Process” under Rule V of the Code of Ethics.¹⁵³ Twenty-six complaints questioned whether the neutral had shown the “require[d] [] commitment . . . to diligence and procedural fairness.”¹⁵⁴ Complaining parties expressed concerns about confidentiality of the process in 12 complaints.¹⁵⁵ The next most frequently made complaints involved the

[i]ndividual appointed by stipulation of the parties or order of the court to assist the parties with communication and cooperation regarding parenting issues, meeting the children's needs, and addressing the best interests of the children. This individual may consult with other professionals working with the parents and children. Parents will mutually agree upon the selection of the consultant and will sign an independent contract with the consultant that outlines the duties and authority of the consultant.

See Glossary, Alternative Dispute Resolution,
<http://www.proparentingservices.com/glossary.php> (last visited Mar. 2, 2006). Courts created this hybrid facilitator in Minnesota. The lack of clarity over their responsibilities to the courts and to parties, especially regarding confidentiality of the process, has led to a number of complaints filed against them. Telephone Interview with Bridget Gernander, *supra* note 152.

¹⁵³ The Minnesota Code of Ethics provides:

A neutral shall work to ensure a quality process. A quality process requires a commitment by the neutral to diligence and procedural fairness. A neutral shall not knowingly make false statements of fact or law. The neutral shall exert every reasonable effort to expedite the process including prompt issuance of written reports, awards, or agreements.

MINN. CODE OF ETHICS, *supra* note 48, R. V.

¹⁵⁴ *Id.*

¹⁵⁵ “The neutral shall maintain confidentiality to the extent provided by Rule 114.08 and 114.10 and any additional agreements made with or between the parties.” *Id.* R. IV. Rule 114.08 on confidentiality provides:

- (a) Evidence. Without the consent of all parties and an order of the court, or except as provided in Rule 114.09(e)(4), no evidence that there has been an ADR proceeding or any fact concerning the proceeding may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding.
- (b) Inadmissibility. Statements made and documents produced in non-binding ADR processes which are not otherwise discoverable are not subject to discovery or other disclosure and are not admissible into evidence for any

mediator's impartiality (nine complaints),¹⁵⁶ conflicts of interest (nine complaints),¹⁵⁷ and mediator interventions or actions that affected party self-

purpose at the trial, including impeachment (except as provided in paragraph (d)).

- (c) [applying to special master and arbitration processes]
- (d) [applying to summary jury trial]
- (e) Records of Neutral. Notes, records, and recollections of the neutral are confidential, which means that they shall not be disclosed to the parties, the public, or anyone other than the neutral, unless (1) all parties and the neutral agree to such disclosure or (2) required by law or other applicable professional codes. No record shall be made without the agreement of both parties, except for a memorandum of issues that are resolved.

MINN. GEN. R. PRAC. 114.08 (amended 2005). Rule 114.10 governing "Communication with Neutral" provides in pertinent part:

- (b) Non-adjudicative Processes. Parties and their counsel may communicate ex parte with the neutral in non-adjudicative ADR processes with the consent of the neutral, so long as the communication encourages or facilitates settlement.
- (c) Communication to Court During ADR Process. During an ADR process the court may be informed only of the following:
 - (1) The failure of a party or an attorney to comply with the order to attend the process;
 - (2) Any request by the parties for additional time to complete the ADR process;
 - (3) With the written consent of the parties, any procedural action by the court that would facilitate the ADR process; and
 - (4) The neutral's assessment that the case is inappropriate for that ADR process.
- (d) Communication to Court During ADR Process. During an ADR process the court may be informed only of the following:
 - (1) If the parties do not reach an agreement on any matter, the neutral should report the lack of an agreement to the court without comment or recommendations;
 - (2) If agreement is reached, any requirement that its terms be reported to the court should be consistent with the jurisdiction's policies governing settlements in general; and
 - (3) With the written consent of the parties, the neutral's report also may identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

MINN. GEN. R. PRAC. 114.10 (amended 2005).

¹⁵⁶ Rule I of the Minnesota Code of Ethics governing "impartiality" provides: "A neutral shall conduct the dispute resolution process in an impartial manner and shall serve only in those matters in which she or he can remain impartial and evenhanded. If at any time the neutral is unable to conduct the process in an impartial manner, the neutral shall withdraw." MINN. CODE OF ETHICS, *supra* note 48, R. I.

determination (eight complaints).¹⁵⁸ Five complaints raised issues about the neutral's competence.¹⁵⁹ Five complaints raised issues about fees.¹⁶⁰ One complainant expressed concern about the neutral's advertising.¹⁶¹ Two other

¹⁵⁷ Rule II of the Minnesota Code of Ethics governing "Conflicts of Interest" provides:

A neutral shall disclose all actual or potential conflicts of interest reasonably known to the neutral. After disclosure, the neutral shall decline to participate unless all parties choose to retain the neutral. The need to protect against conflicts of interest shall govern conduct that occurs during and after the dispute resolution process. Without the consent of all parties, and for a reasonable time under the particular circumstances, a neutral who also practices in another profession shall not establish a professional relationship in that other profession with one of the parties, or any person or entity, in a substantially factually related matter.

Id. R. II.

¹⁵⁸ Mediation Rule I of the Minnesota Code of Ethics governing party "Self-Determination" provides:

A mediator shall recognize that mediation is based on the principle of self-determination by the parties. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. The primary responsibility for the resolution of a dispute and the shaping of a settlement agreement rests with the parties. A mediator shall not require a party to stay in the mediation against the party's will.

Id. Mediation R. I. For a discussion of this rule, see Welsh, *Thinning Vision*, *supra* note 97, at 52–59.

¹⁵⁹ Rule III of the Minnesota Code of Ethics governing "competence" provides: "A neutral shall serve as a neutral only when she/he has the necessary qualifications to satisfy the reasonable expectations of the parties." *Id.* R. III.

¹⁶⁰ Rule VII of the Minnesota Code of Ethics governing "Fees" provides:

A neutral shall fully disclose and explain the basis of compensation, fees and charges to the parties. The parties shall be provided sufficient information about fees at the outset to determine if they wish to retain the services of a neutral. A neutral shall not enter into a fee agreement which is contingent upon the outcome of the alternative dispute resolution process. A neutral shall not give or receive any commission, rebate, or similar remuneration for referring a person for alternative dispute resolution services.

Id. R. VII.

¹⁶¹ Rule VI of the Minnesota Code of Ethics governing "Advertising and Solicitation" provides:

A neutral shall be truthful in advertising and solicitation for alternative dispute resolution. A neutral shall make only accurate and truthful statements about any alternative dispute resolution process, its costs and benefits, the neutral's role and

complaints generally questioned whether the neutral had overstepped his or her authority.¹⁶²

As of June 11, 2005, the ADR Review Board had three pending complaints in investigation, planned to review another three complaints at its next meeting, dismissed eight complaints for failure to state a claim under the Code of Ethics,¹⁶³ and referred one complaint, about a lawyer who was not acting as a neutral, to the Lawyers Professional Review Board (LPRB).¹⁶⁴ The ADR Review Board dismissed five complaints after the investigation revealed no violation of the Code of Ethics. In eight cases, it imposed sanctions on the mediator. In two of those cases, the neutral unsuccessfully appealed the sanctions. In three early cases, the ADR Review Board had no easily accessed record of the disposition of the complaint.¹⁶⁵ One complainant filed the complaint before the Minnesota Supreme Court had adopted the Code of Ethics. The ADR Review Board asked permission to use the information stated in the complaint in future training sessions.¹⁶⁶

The ADR Review Board imposed four types of sanctions. In two cases, it notified the appointing court and the court ADR administrator of the complaint and its resolution. In another two cases, the ADR Review Board issued a private reprimand. In two more cases, the ADR Review Board instructed the neutral to obtain additional training. In one of those cases, it also required the neutral to work with an established parenting consultant who could serve as a mentor. In the last two cases, the ADR Review Board required the neutrals to modify their Parenting Time Expeditor Agreements

her or his skills or qualifications. A neutral shall refrain from promising specific results.

Id. R. VI

¹⁶² No specific rule of the Minnesota Code of Ethics applies to the mediator's authority. However, the ADR Review Board sanctioned the mediator in both complaint actions when the complaining party combined this allegation with allegations about the neutral's ability to maintain the quality of the process. The Advisory Task Force Comments discuss the interventions a mediator has authority to make in the 1997 comments to Rule 1 of the mediation rules. MINN. CODE OF ETHICS, *supra* note 48, Mediation R. I, Advisory Task Committee.

¹⁶³ *Id.*

¹⁶⁴ Minnesota ADR Review Board Complaint Log, *supra* note 152. The LPRB administers the Minnesota lawyer disciplinary system. See About the Lawyers Professional Responsibility Board, <http://www.courts.state.mn.us/lprb/abtlprb.html> (last visited Mar. 2, 2006).

¹⁶⁵ Minnesota ADR Review Board Complaint Log, *supra* note 152.

¹⁶⁶ *Id.*

to “be clearer about confidentiality expectations of parties,” by allowing parties to give a knowing waiver of the rights created under Rule 114.¹⁶⁷

5. Complaints Filed Against Maine Mediators

Maine has approximately 140 rostered mediators¹⁶⁸ that serve a state-wide population of approximately 1.27 million people.¹⁶⁹ The Director of the Office of Court ADR for Maine (ADR Director) has received or raised¹⁷⁰ 29 complaints against mediators since 1997.¹⁷¹ The summary of the nature of the complaints is not tied to the Code of Conduct for Maine Judicial Branch ADR Neutrals.¹⁷² Unlike the other states studied, the Code of Conduct is not

¹⁶⁷ *Id.*; see discussion *supra* note 152.

¹⁶⁸ E-mail from Diane Kenty, ADR Director, Maine Jud. Branch, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 27, 2005, 8:53 EST) (on file with author); see also Maine.gov, Directory of ADR Neutrals on Superior Court Rosters, <http://www.courts.state.me.us/courtservices/adr/directory.html> (as of Aug. 29, 2005 the court’s website lists only 89 rostered mediators); Conference Transcript, *supra* note 88, at 38, 47 (indicating Maine had about 90 rostered mediators). The ADR Director explains that the website list does not include domestic relations or other types of mediators. E-mail from Diane Kenty, ADR Director, Maine Jud. Branch, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Sept. 1, 2005, 14:24 EST) (on file with author). However, the website search format suggests that this list is inclusive of all rostered mediators.

¹⁶⁹ U.S. Census, State & County QuickFacts, <http://quickfacts.census.gov/qfd/states/23000.html> (last visited Feb. 5, 2006).

¹⁷⁰ The ADR Director recounted a situation in which she saw a mediator violate the ethics code by discussing a recently completed mediation with the court clerk. See Conference Transcript, *supra* note 88, at 44.

¹⁷¹ Maine CADRES Complaint Log attached as Appendix G, provided by the ADR Director. See Letter from Diane Kenty, ADR Director, Maine Jud. Branch to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 11, 2005) (on file with author).

¹⁷² ME. CODE OF CONDUCT, *supra* note 48. At the time the author conducted the research for this article, the Maine Supreme Court did not make the Maine Code of Conduct available to the public on its website. See Maine.gov, ADR Rules, http://www.courts.state.me.us/courtservices/adr/adr_rules/html (last visited Mar. 2, 2006); see also E-mail from jbwebmaster, one, Maine government, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 18, 2005, 9:48 EST). The ADR Director provides a copy of the Maine Code of Conduct upon request. See ME. CODE OF CONDUCT, *supra* note 48, Canon 1 A–E. In a more recent e-mail, the ADR Director advised that the website will soon have active links to the Maine Code of Conduct and other ADR related rules. See E-mail from Diane Kenty, Director of the Office of Court ADR for Maine, to Paula M. Young, Assistant Professor of Law,

organized in the traditional format around the core values of mediation—impartiality, party self-determination, and confidentiality. Instead, its focus tends to be on issues of impartiality, conflicts of interest, and public trust in the legal or judicial system.¹⁷³

Appalachian School of Law (Aug. 1, 2005, 10:22 a.m. EST) (on file with author). In September 2005, the webmaster activated the links.

¹⁷³ Canon 1 admonishes the neutral to maintain high standards of conduct through competence, compliance with court rules, fidelity and diligence to the mediation process, and by not suggesting that the neutral is in a “special position to influence any judicial official or decision outside [the mediation context].” ME. CODE OF CONDUCT, *supra* note 48, Canon 1A–E.

Canon 2 instructs the neutral to promote public confidence in the integrity and impartiality of ADR. It instructs the neutral to act impartially and without bias or prejudice. The neutral may also take cases only when the neutral “has or obtains sufficient training, skill, and any substantive knowledge relevant to the dispute.” *Id.* Canon 2A(4). The neutral must withdraw if he or she finds the case goes beyond his or her competence. *Id.* The same canon also instructs the neutral to require order and decorum, be patient, dignified and courteous, and again to act without bias or prejudice. *Id.* Canon 2B(1)–(3). It also instructs the neutral to give participants a right to be heard. *Id.* Canon 2B(5). In a two-sentence paragraph, it deals with confidentiality in mediation by providing: “A Neutral shall preserve the confidentiality of conduct and communications of the participants except if disclosure is required by rule or law. Confidentiality may be waived by the consent of all participants.” *Id.* Canon 2B(6). The next subsection also prohibits a neutral from disclosing “non-public information” acquired in mediation for any purpose unrelated to his or her ADR duties. A neutral also cannot publicly comment about the ADR process except where the parties waive confidentiality. *Id.* Canon 2B(7). The last subsection of Canon 2B requires the neutral to promptly dispose of the matter and to perform his or her ADR responsibilities properly. *Id.* These confidentiality provisions do not exempt communications needed to make or defend a claim of mediator misconduct.

Canon 2C deals with disclosure of conflicts of interests, impartiality, and withdrawal as the neutral. *Id.* Canon 2C (1)–(3). Canon 2D discusses fees. It also instructs the neutral that he or she shall not “unnecessarily or inappropriately commence or prolong an ADR process . . .” *Id.* Canon 2D.

Canon 3 again deals with impartiality. It also instructs the neutral to conduct his or her ADR or other professional activities in a way that does not demean the neutral or interfere with his or her proper performance. *Id.* Canon 3.

Canon 4 imposes on rostered neutrals the requirement to comply with the Maine Code of Conduct, the rules governing ADR, and any other professional code that governs the activities of the neutral. *Id.* Canon 4.

The Maine Code of Conduct gives the overall impression that it is modeled on judicial rules of conduct rather than on a well-vetted set of rules governing mediators. Of necessity, the Director often considers the aspirational guidelines of mediator conduct promulgated by the Maine Association of Dispute Resolution Professionals in handling complaints against mediators. Telephone Interview with Diane Kenty, Director of the

As a result, the Director has captured the nature of complaints in the following categories with the number of times a person raised the complaint appearing in parenthesis following the nature of the complaint: lacked impartiality (7); had an ineffective style of mediation (6); had insufficient knowledge or competence to conduct the mediation (5); was ineffective in working with attorneys (2); was insensitive to domestic violence issues in the divorce context (3); was rude (3); was confrontational (1); had professional role confusion (1); acted unprofessionally (1); and was arrogant (1). The summary also notes complaints that the mediator offered a solution (1), opinion (2), legal advice (2), or recommended settlement (3). In two complaints, the mediator pressed for settlement. Mediators also left the mediation prematurely (1), failed to appear (1), and failed to accurately write the points of agreement (1).¹⁷⁴ One party complained about the poor appearance of the mediator.¹⁷⁵ The Director recently explained that the system is intended to have sufficient flexibility to “address a full range of complaints, [from] . . . the frivolous or minor end of the spectrum all the way to . . . [the] serious and egregious breach of ethical standards.”¹⁷⁶

The data provided by Maine does not indicate the number of complaints dismissed for lack of jurisdiction, as facially insufficient, or as unsupported by the factual investigation.¹⁷⁷

The Code of Conduct does not specify sanctions the ADR Director or the Maine Supreme Judicial Court may impose for violations of the code. The ADR Director, however, has imposed a number of sanctions focused on improving the mediator’s skills and understanding of mediation theory and practice. Most frequently—in 23 complaints—the ADR Director planned to observe and supervise the mediator in one or more future mediations. She has also discussed the nature of the complaint with the mediator in nine complaints. In five situations, the mediator voluntarily resigned from the

Office of Court ADR for Maine, Maine Jud. Branch, in West Bath, Maine (July 1, 2005); *see also* Maine Association of Dispute Resolution Professionals, <http://www.madrp.org/Ethics.html> (last visited Mar. 2, 2006).

¹⁷⁴ Maine CADRES Complaint Log, *supra* note 171.

¹⁷⁵ In Florida, staff would refer to the Complaint Committee even a complaint, like this, that appears facially insufficient. *See* Conference Transcript, *supra* note 88, at 23 (Sharon Press: “If a complaint comes in and it says that, ‘I didn’t like my mediator because the mediator wore . . . an ugly outfit.’ That complaint goes to a complaint committee”).

¹⁷⁶ Conference Transcript, *supra* note 88, at 45.

¹⁷⁷ Maine CADRES Complaint Log, *supra* note 171.

roster or agreed not to mediate cases.¹⁷⁸ In one situation, the ADR Director also de-rostered a mediator for breaching confidentiality, but that sanction does not appear on the Maine CADRES Complaint Log because it did not arise from a formal complaint.¹⁷⁹ In three complaints, the ADR Director instructed the mediator to observe other mediators and to obtain additional training. Other interventions,¹⁸⁰ applied only one time each, included meeting with the complainant, meeting with the mediator, changing the mediator's court assignments, and sending a letter.¹⁸¹ Thus, despite the low number of rostered mediators in Maine, the complaint process has led to the voluntary or involuntary removal from the court's roster of more mediators than any state analyzed in this article.

6. *Summary and Analysis of Complaints*

Three types of mediator conduct most frequently trigger complaints against mediators. Conduct which makes a party believe that the mediator has lost his or her impartiality is the most frequently cited reason for filing a complaint in Virginia and Maine. It appears as the second most frequently raised allegation in Florida, Georgia, and Minnesota. Interference with a party's self-determination, by offering legal advice, by giving legal opinions, by recommending settlement, or by engaging in more overt acts of coercion formed the most frequent allegation in Florida and Georgia and the second most frequent allegation in Virginia. Poor quality of the process or an ineffective mediator style formed the most frequent allegation in Minnesota, the second most frequent allegation in Maine, and the third most frequent allegation in Virginia. Surprisingly, breaches of confidentiality got traction only in Minnesota as a basis for a complaint. These complaints arise

¹⁷⁸ The allegations leading to the four voluntary resignations from the roster were: "lacked focus in mediation / offered solutions"; "rude to litigant"; "insensitive to DV issues / offered own opinion / recommended settlement"; and "failure to appear / competence to mediate." The allegations leading to the voluntary inactive status of one mediator were: "asked degrading questions, pressed for agreement / poor appearance." Maine CADRES Complaint Log, *supra* note 171.

¹⁷⁹ See discussion *supra* note 111 and accompanying text.

¹⁸⁰ The ADR Director does not consider these actions "sanctions." Accordingly, I have called them interventions. Attachment to e-mail from Diane Kenty, ADR Director, CADRES, to Professor Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Aug. 26, 2005, 16:02 EST) (on file with author).

¹⁸¹ Maine CADRES Complaint Log, *supra* note 171.

apparently because some parenting consultants misunderstand how much confidential information they may reveal to the appointing court.¹⁸²

As a sanction, regulators are most likely to require a mediator to take additional training or to learn from experienced mediators by observing them, working under their supervision, or co-mediating with them. As noted above, only six mediators have been forced or agreed to get off the state supreme court's roster of mediators, with five of those sanctions occurring in Maine. Only Florida has the power to impose economic sanctions. Virginia and Maine may recommend that a mediator get additional training or supervised experience even if the mediator has not violated an ethics rule.

Of the nearly 9,000 mediators regulated by the states analyzed in this article, less than 100 mediators have received any type of sanction, remedial recommendation, or intervention for conduct inconsistent with ethical standards. Florida, with the most rostered mediators, applied 40 interventions or sanctions against mediators. Maine, with the least number of rostered mediators, applied 43 interventions or sanctions against mediators. In both situations, regulators imposed more than one intervention or sanction on a single mediator or the mediator may have accepted more than one intervention or sanction. One can conclude, however, that Maine has an aggressive grievance process that more frequently results in an intervention or sanction against one of the members of its shorter list of rostered mediators.

The number of claims dismissed by the regulators in these states provides the bigger story. In the states reporting dismissal data, the regulators dismissed 67 formal complaints for lack of jurisdiction, for failure to state a claim, and as a matter of probable cause when the factual investigation did not support the allegations in the complaint. Not every state keeps records of the number of informal complaints received. However, the directors of these court-connected mediation programs believe that their grievance systems offer parties a place to express their concerns about a mediator or mediation even if those persons do not wish to take the next step to formalize the complaint.¹⁸³ For instance, in Virginia, persons did not pursue 55 of the 68 informal complaints. Thus, the complaint processes in these states may protect mediators from frivolous claims that might otherwise result in malpractice suits or grievances filed with other professional organizations. Data supplied by Complete Equity Markets, Inc., the leading insurer of

¹⁸² E-mail from Bridget Gernander, Staff Attorney, Minnesota A.D.R. Review Board, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Nov. 4, 2005, 11:48 EST) (on file with author).

¹⁸³ Conference Transcript, *supra* note 88, at 10, 42, 58.

mediators, show that the few malpractice suits brought against mediators arose from ADR proceedings in states without a mediator complaint process, except for two malpractice suits filed in Florida.¹⁸⁴

V. WHY PROVIDE A GRIEVANCE SYSTEM ALLOWING COMPLAINTS AGAINST MEDIATORS WORKING IN COURT-CONNECTED PROGRAMS?

Mediator complaint systems would seem to protect the reputations and legitimacy of referring courts. They reinforce the core values of the field of mediation and so protect the reputation of the process. They better ensure that mediators understand their ethical obligations and provide parties quality mediation services. They also provide—depending on the design of the system—unhappy parties with procedural fairness that extends beyond the formal end of the mediation session. The grievance systems potentially protect lawyers and mediators from frivolous claims of malpractice or misconduct.

Nancy Welsh has suggested that as court-connected ADR programs gained successful institutionalization, a call came out from courts, mediators, and users of the services for better information about why they should use the processes, what happened in the processes, and what types of interventions neutrals could and would make.¹⁸⁵ The Uniform Mediation Act represents one response to those requests for clarity and predictability. “Other attempts to respond, however, have been markedly unsuccessful. Mediators have been unable to develop field-wide standards for mediator certification, a uniform

¹⁸⁴ Clough & Foss, *supra* note 66, at 1–5 (providing description of the lawsuits without sufficient detail to make definitive statements about the states in which they were filed or whether they were filed before the states analyzed in this article had created their complaint processes); *see also* Rubin & McGirney, *supra* note 54 (stating that as of 2002, Complete Equity Markets, Inc. reported 21 ADR neutral malpractice cases: California had six; Florida had four (including two grievance proceedings); New York and Texas had three each. Five other states had one case each: New Jersey, Pennsylvania, Colorado, Wisconsin, and Ohio. Of the reported cases, 14 involved mediators and 7 involved arbitrators. Ten of the 21 cases involved employment law; 6 involved family law; 2 involved insurance coverage; the other cases involved contract, civil rights, and other matters.).

¹⁸⁵ Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 574, 575 (2004) [hereinafter Welsh, *Looking Glass*] (examining the importance of procedural justice in the context of special education mediation and using 70 interviews of participants in 12 mediations to conclude that parents value the mediations as being more procedurally just than the unsupervised meetings with school officials).

mechanism for mediator evaluation or even clear ethical boundaries regarding mediators' provisions of advice."¹⁸⁶ In addition, as the earlier discussion in this article shows, few courts have responded to the need to assure quality in their mediator pools through complaint and sanctioning systems.

A. *Protecting the Reputations and Legitimacy of Referring Courts*

Magistrate Judge Wayne D. Brazil, a judge with the United States District Court for the Northern District of California, states several reasons for designing an effective system to monitor, evaluate, and sanction mediators working in court-connected programs. First, he expresses concern that legislators and the public may "blur ethically unassailable court ADR programs with perceived corporate abuses of [private] ADR processes."¹⁸⁷ Lawmakers and the public may suspect that even court-connected ADR processes are designed to "hide from the public not only dangerous products, conditions, or substandard professional services, but also possible corruption in the private neutral community"¹⁸⁸

At the same time, lawmakers funding court-connected programs may pay inappropriate attention to settlement rates and docket clearing procedures. Courts, subject to these funding pressures, may in turn "permit only the most assertive lawyers or process professionals to serve as neutrals in their ADR program[s], or only those who appear to have the most clout with certain types of parties or lawyers."¹⁸⁹ More assertive interventions can lead parties to perceive that the mediator has pressured them to settle.

In court-referred mediations, parties may already feel pressure to settle, says Brazil. Taken together, parties may resent mediation and infer "that the court's real purpose in making the referral to ADR was not to provide the parties with a service, but to get rid of them."¹⁹⁰ Brazil fears the risk of inviting parties to see courts as institutionally selfish.

Professor Nancy Welsh further analyzes these themes in the context of the procedural justice afforded to mediation parties. Her research indicates that parties' perceptions of procedural justice—voice, consideration, evenhandedness, and dignity—influence their perceptions of the legitimacy of

¹⁸⁶ *Id.*

¹⁸⁷ Wayne D. Brazil, *supra* note 8, at 120.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 122–23.

¹⁹⁰ *Id.* at 123.

legal authority, including courts.¹⁹¹ She quotes Brazil as saying that the courts' "most precious asset is the public's trust."¹⁹² That trust is based on the public's belief "that the aspect of justice for which [the courts] are primarily responsible is process fairness [and] process integrity. It follows that the characteristic of our ADR programs about which we must be most sensitive is fairness, especially process fairness."¹⁹³ She explains: "[S]eeking out and listening to the voices of individual disputants should be particularly important in a democracy that proclaims the value and dignity of the individual and in a field that names disputants' self-determination as its fundamental underlying principle. Indeed, seeking out and listening to the voices of individual disputants is essential for the maintenance of the legitimacy of the various public institutions that now embrace mediation."¹⁹⁴ Judge Wade McCree of the United States Court of Appeals for the Sixth Circuit reminded participants at the Pound Conference of the importance of a continued focus on justice. He said: "The courts must not improve efficiency in ways that endanger justice, [or] that endanger the appearance of justice"¹⁹⁵

Mindful of these dynamics, an 18 member Advisory Board composed of judges, state and local court administrators, mediators, mediation program administrators, attorneys, corporate representatives, academics, evaluators, and officers of professional mediation organizations with diverse viewpoints developed the National Standards for Court-Connected Mediation Programs (National Standards).¹⁹⁶ The National Standards, if adopted, should "enhance

¹⁹¹ Welsh, *Looking Glass*, *supra* note 185, at 606 n.137.

¹⁹² *Id.* at 577 n. 21, quoting Wayne D. Brazil, *Continuing the Conversation About the Current Status of the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 24.

¹⁹³ *Id.*; Nancy Welsh, *Disputant's Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 185 [hereinafter Welsh, *Hollow Promise*] ("Perceptions of procedural justice influence disputants' . . . perceptions of the legitimacy of the institution that provided or sponsored the dispute resolution process.").

¹⁹⁴ Welsh, *Hollow Promise*, *supra* note 193, at 605–06.

¹⁹⁵ The Pound Conference: Perspectives on Justice in the Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice 24 (A. Leo Levin and Russell R. Wheeler eds., 1979) [hereinafter Pound Conference], quoted in Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 403(2004–05) [hereinafter Welsh & McAdoo, *Look Before You Leap*]. Excerpts from the conference appear at *Varieties of Dispute Processing*, 70 F.R.D. 79 (1976).

¹⁹⁶ See NATIONAL STANDARDS, *supra* note 8, at i.

confidence in and satisfaction with our public justice system.”¹⁹⁷ The Advisory Board expressed concern that: “The dearth of generally accepted principles to guide courts in designing, implementing and improving such programs risks . . . confusion and dissatisfaction on the part of individual users as well as the public at large, who come to view these programs as a form of second-class justice.”¹⁹⁸ It acknowledged that for some disputants, court-connected mediation programs may be their only contact with the public justice system.

The National Standards Advisory Board recommended that courts monitor the quality of mediators working in court-connected programs and provide mediation participants access to a complaint mechanism designed to handle any grievance about a mediator or the process. It suggested courts should evaluate the program on a periodic basis through participant surveys and other forms of feedback to permit the court to correct any deficiencies in the process and to monitor the performance of mediators. Courts should also remove from their rosters mediators who performed below expected skill levels or outside ethical constraints. The Advisory Board further recommended that courts adopt a code of ethics, protect mediators from civil liability, and provide sufficient resources for these functions.¹⁹⁹

Similarly, the CPR-Georgetown Commission on Ethics and Standards in ADR recognized in its Principles for ADR Provider Organizations that “[t]he growth and increasing importance of ADR Provider Organizations, coupled with the absence of broadly-recognized standards to guide responsible practice, propel[led] this effort . . . to develop the following Principles”²⁰⁰ It suggested that a provider “take all reasonable steps to maximize the quality and competence of its services” and take all reasonable steps to monitor the quality and competence of affiliated neutrals. These steps could include soliciting mediator evaluations, debriefing mediation participants, making follow-up calls, conducting periodic performance

¹⁹⁷ *Id.* at ii.

¹⁹⁸ *Id.* at i.

¹⁹⁹ See discussion *infra* notes 856–60 and accompanying text. Diane Kenty, the Director of the Maine Court-Connected Mediation Program remarked: “One thing I’ve learned from administering [the grievance system] . . . is how much time these things do take.” Conference Transcript, *supra* note 88, at 51–52.

²⁰⁰ See CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, *Principles for ADR Provider Organizations*, 56 U. MIAMI L. REV. 983, 986–87 (2002) [hereinafter CPR-Georgetown Commission] (framing nine standards of responsible practice for ADR provider organizations in the rapidly growing field of mediation).

reviews, offering processes for receiving complaints filed against neutrals,²⁰¹ and disciplining or removing neutrals who failed to meet ethical or other standards.²⁰² It also suggested that ADR providers “should require affiliated neutrals to subscribe to a reputable internal or external ADR code of ethics, absent or in addition to a controlling statutory or professional code of ethics.”²⁰³ In addition, it recommended that the ADR provider dedicate staff and resources to meet these suggested obligations to ADR users, the courts, and the public.²⁰⁴

In connection with complaint procedures, the National Standards Advisory Board explained in comments to the standards that “widespread” agreement existed about the need for courts to implement “specific, written complaint mechanisms” that were “based upon a clear code of ethical conduct by mediators.”²⁰⁵ While the Advisory Board did not recommend that the courts require unhappy participants to mediate their complaints against mediators, it did recommend that the courts offer this option. Similarly, the CPR-Georgetown Commission urged ADR providers to adopt ethical guidelines to “help insure that neutrals . . . are familiar with and conduct themselves according to prevailing norms of ethical conduct in ADR.”²⁰⁶

Thus, both sets of guidelines set high expectations about the court’s role in ensuring the quality of the services provided by mediators. The guidelines expect courts to encourage mediators to engage in ethical conduct and responsible practice. They also expect courts to monitor mediator compliance with ethics and best practices. Both sets of guidelines respond to the “greater scrutiny in the marketplace, in the courts, and among regulators, commentators and policy makers” of ADR services.²⁰⁷ They both seek to create fair ADR processes.²⁰⁸ The guidelines “reflect the best thinking

²⁰¹ *Id.* at 1003 (recommending that ADR provider organizations offer processes for receiving complaints against neutrals).

²⁰² *Id.* at 989, 990, 1003.

²⁰³ *Id.* at 997.

²⁰⁴ *Id.* at 1004.

²⁰⁵ NATIONAL STANDARDS, *supra* note 8, at 2–6.

²⁰⁶ CPR-Georgetown, *supra* note 200, at 997; *see also* Moffitt, *Remodeling*, *supra* note 47, at 98 (“Crucial to the functioning of codified restrictions [of professional conduct] is the existence of enforcement mechanisms Mediators . . . face no consistent or predictable threat of enforcement.”).

²⁰⁷ CPR-Georgetown, *supra* note 200, at 965; NATIONAL STANDARDS, *supra* note 8, at i–ii.

²⁰⁸ CPR-Georgetown, *supra* note 200, at 986 (ADR providers should meet the parties’ expectations for “fair, impartial, and quality dispute resolution services and processes”); NATIONAL STANDARDS, *supra* note 8, at Commentary to § 11.1 (“Fairness of

currently about what constitutes quality in court-connected mediation programming efforts.”²⁰⁹ These thinkers express the concern that courts must assume more responsibility for the ADR programs they offer.

Leila Taaffe, the Director of the Georgia Office of Dispute Resolution, sees it this way:

In the court context we’re very concerned about protecting the public. We say to the courts, “You should send certain cases to us” And there’s a *quid pro quo* If we’re saying to the courts . . . “Send [us] your poor, your tired, your depressed, what[ever] . . . to mediation,” and we don’t guarantee [the courts] some kind of minimal quality in terms of performance [of the mediator] . . . [the courts are] putting themselves into a very precarious position. Because [we are] . . . taking people who have availed themselves of the courtroom. Who have followed the process that we acknowledge in this country for settling disputes and [the courts are] saying, “Well, try this [mediation], this is going to enhance the civil justice system, or this is going to give you control over resolving the dispute.” But unless we can guarantee them some quality and some consistency in that practice, [the courts are] putting themselves on the line. And most of these people are elected officials, and they care what their community thinks. And they should care.²¹⁰

Welsh summarizes this thinking, perhaps, when she states that as “the degree of party autonomy decreased [through mandatory referrals to mediation], the need for court oversight increased.”²¹¹ As Welsh notes: “[C]ourts are delegating one of their judicial functions to court-connected mediators. The courts ultimately should remain accountable for their delegates’ performance. Therefore, effective monitoring and evaluation, including ethical requirements and grievance procedures, should always accompany court-connected mediation programs.”²¹² Another commentator

the mediation process requires both courts and mediators to protect the parties’ ability to make free and informed choices about whether or not to settle.”).

²⁰⁹ NATIONAL STANDARDS, *supra* note 8, at ii; *see also* CPR-Georgetown, *supra* note 200, at 983 nn.2, 4.

²¹⁰ Conference Transcript, *supra* note 88, at 7–8.

²¹¹ Welsh, *Thinning Vision*, *supra* note 97, at 33 n.138 (citing SPIDR COMMISSION ON QUALIFICATIONS, QUALIFYING NEUTRALS: THE BASIC PRINCIPLES, SPIDR COMMISSION ON QUALIFICATIONS REPORT 14 §§ 2-1, 6-1, 6-3, 6-5, 6-6 (1989)).

²¹² McAdoo & Welsh, *Look Before You Leap*, *supra* note 195, at 427.

sums up the situation by saying: "Mediation has yet to confront and to discipline the power it distributes [to mediators]."²¹³

B. Protecting Parties, the Process, and the Field by Protecting Procedural Fairness in the Mediation Process and the Grievance Process

In several articles, Welsh summarizes the research and thinking about procedural justice by analyzing its components and offering several theories to explain why disputants perceive it as important in the mediation context.²¹⁴ Research on procedural justice has found that it has essentially four parts. First, parties need to feel that they have sufficient time and opportunity to tell their stories about the dispute, voice their concerns, and offer evidence in support of their views. They need to have some control over the presentation of this information. The literature has called this component of procedural justice "voice." Second, parties need to feel that the third-party—whether a judge, an arbitrator, or a mediator—has considered those stories, concerns, and the evidence. Third, disputing parties need to feel that the third-party has treated the parties even-handedly. Finally, parties

²¹³ Judith Resnick, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 169.

²¹⁴ Welsh, *Making Deals*, *supra* note 77, at 817–30; Welsh, *Thinning Vision*, *supra* note 97, at 7–8 n.24; Welsh, *Hollow Promise*, *supra* note 193, at 184–87; Welsh, *Looking Glass*, *supra* note 185, at 575–82; *see also* Lisa B. Bingham, *Why Suppose? Let's Find out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 81, 85–95 (suggesting that courts should pay more attention to ADR design issues rather than, as they have, experiment blindly; asserting that research shows parties prefer mediation when it satisfies procedural justice concerns; and suggesting that the lower use of ADR on a voluntary basis may indicate a failure in the full implementation of the system design in courts; urging courts to collect data that would help the field better understand court-connected ADR processes and outcomes); Hensler, *supra* note 8, *passim* (arguing that litigants like trials, that courts making referrals to ADR may undermine their own legitimacy, and cautioning the field to develop ADR processes that are fair from a procedural justice perspective); E. Patrick McDermott & Danny Ervin, *The Influence of Procedural and Distributive Variables on Settlement Rates in Employment Discrimination Mediation*, 2005 J. DISP. RESOL. 45, 48–50 ("[P]arties to a dispute must first be given a fair chance to voice their concerns. Second, parties must have control over the outcome of mediation since mediation is about self-determination. Third, the mediator must be perceived as (and be) fair and neutral.").

must feel that the third-party treated them politely and with respect and dignity.²¹⁵

No research explains why parties look for these elements of procedural fairness. Three hypotheses—the “social exchange” hypothesis, the “group values” hypothesis, and the “fairness heuristic” hypothesis—may explain the importance of procedural justice. The first hypothesis suggests that procedural justice, especially adequate voice, serves the disputants’ goals of reaching favorable outcomes by enhancing the likelihood of getting a favorable outcome. The second hypothesis posits that procedural justice gives disputants the message that they are valuable members of society. It conveys to them messages about their status in society, which, in turn, bolsters their self-esteem and self-respect. Procedural justice may demonstrate to disputants that courts “recognize their own role as that of ‘public servants and [recognize] . . . the role of citizens as clients who have a legitimate right to certain services.’”²¹⁶ The last hypothesis asserts that people fear being exploited by authoritative decision-makers. Their positive evaluations of procedural justice provide a mental shortcut reassuring them that they have not been exploited.²¹⁷

The research also shows that procedural justice affects parties’ perceptions about the justice of the substantive outcome.²¹⁸ It also affects their compliance with those outcomes. And it affects their perceptions of the legitimacy of the authorities producing those outcomes.²¹⁹ Welsh explains:

If disputants perceive that the third party is treating them and their dispute in a procedurally just manner, then it becomes somewhat easier to trust that

²¹⁵ Welsh, *Hollow Promise*, *supra* note 193, at 185; Welsh & McAdoo, *Look Before You Leap*, *supra* note 195, at 405.

²¹⁶ Welsh, *Making Deals*, *supra* note 77, at 824, quoting Tom R. Tyler & Robert Folger, *Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters*, 1 BASIC & APPLIED SOC. PSYCHOL. 281, 292 (1980); Hensler, *supra* note 8, at 93 (“According ‘due process’ to individuals is equivalent to recognizing their status as members in good standing in their social group . . .”).

²¹⁷ Hensler, *supra* note 8, at 93.

²¹⁸ Welsh, *Making Deals*, *supra* note 77, at 792 (“Ultimately, insuring that mediation comes within a procedural justice paradigm serves some of the courts’ most important goals—delivering justice, delivering resolution, and fostering respect for the important public institution of the judiciary.”)

²¹⁹ Welsh, *Hollow Promise*, *supra* note 193, at 181–82.

the third party's decision will be based on all relevant information and that the third party will attempt to make a substantively just decision.²²⁰

Welsh's work over the last four years shows that these aspects of procedural justice apply in mediation even though the parties retain control over the outcome.²²¹ Thus, when a party has perceived that he or she has not gotten procedural justice in the mediation, that party's belief in the legitimacy of the court or entity that referred the case to mediation suffers. The party is also unlikely to say anything positive about the mediator or the process of mediation, thereby damaging the reputation of both and potentially undermining the use of mediation long-term.²²² If we do not offer that party a meaningful grievance process, then we permit these negative perceptions to linger. If we offer a grievance process that also fails to provide elements of procedural justice, we risk victimizing the party twice.²²³

While Welsh and Brazil have applied the concept of procedural justice to the mediation process itself, I assert that we must also consider it as a reason for creating mediator complaint systems. We must also consider it in the design of those systems if we want to ensure that parties perceive the

²²⁰ Welsh, *Making Deals*, *supra* note 77, at 830.

²²¹ Welsh, *Looking Glass*, *supra* note 185, at 663 ("Quantitative studies have begun to detect the effects of procedural justice and resolution. The interviews analyzed here affirm that procedural justice and resolution represent the dual cornerstones of mediation's value to disputants—and thus should become the cornerstones for mediator selection, training, and evaluation."); Welsh, *Making Deals*, *supra* note 77, at 791 ("[P]articularly within the context of the courts, mediation should be expected to deliver to disputants an experience of justice, more commonly referred to as *procedural* justice.") (emphasis added).

²²² Welsh, *Looking Glass*, *supra* note 185, at 629–51.

²²³ My concern parallels the concern of A. Leon Higgenbotham expressed at the Pound Conference about court connected ADR programs. He said:

I hope the fruits of [the conference's] success will flow not just to judges, not just to lawyers, not just to court personnel, but also to those who, in the nature of things, will seldom be attending a conference like this—the weak, the poor, the powerless—those who, whether they like it or not, are inevitably involved in the process and the system that we are privileged to preside over. By all means let us reform that our process, let us make it more swift, more efficient, and less expensive, but above all let us make it more just Let us not, in our zeal to reform our process, make the powerless into victims who can secure relief neither in courts nor anywhere else.

Welsh & McAdoo, *Look Before You Leap*, *supra* note 195, at 403.

mediation process as procedurally fair, from beginning to end, and then some.²²⁴

On a more practical note, Charles Pou, Jr., a system designer who resists formal regulation in the field, nonetheless has written:

Meaningful options for handling grievances, and occasionally sanctioning misbehavior, are important to the quality and credibility of a mediation system. Such a system should include continuing ethics education, feedback, and a complaint procedure. . . . [Quality Assurance] systems should be more proactive in addressing complaints, lest the market or legislatures drive decision making in this area.²²⁵

Thus, while little consensus may exist in the field about barriers to entry and other aspects of the regulation of mediators, much more consensus exists about the need to design and implement grievance systems.

C. Enhancing Mediator Skills and Ethics

I speculate, based on my own experience, that grievance systems designed to reinforce ethical standards encourage the use of better skills in mediation. They force persons in the field to learn more about ethics, especially when combined with a requirement that mediators take continuing mediator education on a regular basis. Enhanced knowledge of applicable ethics codes and standards of practice give mediators greater self-awareness of the choices they make in mediation and help them see when they may need to get additional training in dispute resolution theory, skills, and ethics. The grievance systems also help mediators with poor skills to improve them or to agree to get out of the field. As a system, ethics codes and grievance processes help mediators avoid conduct that may give rise to a professional complaint or malpractice suit. Empirical research may eventually support these hypotheses.

Leila Taaffe, the Director of the Georgia Office of Dispute Resolution, acknowledged the unique situation in which mediators typically work. "A lot of mediators sit alone in little tiny rooms. In our state it's little tiny windowless, mostly airless, rooms in courthouses. And a lot of mediators

²²⁴ Welsh agrees. Welsh & McAdoo, *Look Before You Leap*, *supra* note 195, at 426–27 ("Courts should establish monitoring and evaluation mechanisms to ensure the quality of mediator performance, with emphasis upon procedural justice factors. Courts should establish ethical requirements for mediators, as well as easily-accessible grievance procedures.").

²²⁵ Pou, *Assuring Excellence*, *supra* note 32, at 346.

actually welcome much more feedback and discussion, and I think it's important that a process allows for that."²²⁶ She could also mention that mediators work under strict rules of confidentiality that in many states would preclude them from discussing with their peers any dilemmas they faced in mediated cases. The opportunity for specific feedback from experienced peers in actual cases remains limited.

Grievance systems, with confidentiality rules that permit a careful and open consideration of the events that occurred in mediation, can be an extremely valuable source of feedback and information for mediators. Maryland's Grievance Process Committee expressly recognizes in its proposal to create a grievance system that "mediators must see the program . . . as one of many resources for them to improve their skills and sharpen their practice."²²⁷ Sharon Press, the Director of the Florida DRC, remarked: "I've learned a lot based on the grievances that have come in . . . And I think as a consequence, I've become a better mediator and more sensitive to things just having read the grievances and worked with that process."²²⁸

D. Protecting Mediators from Frivolous Claims

As noted above, regulators dismissed 67 formal complaints for lack of jurisdiction, failure to state a claim, and as a matter of probable cause following a factual investigation. In Virginia, mediation participants did not pursue 55 of the 68 informal complaints made to the DRS Director. However, these numbers do not capture the complete story. Several of the states analyzed do not report informal complaints, nor do they report formal complaints that do not result in a sanction.

The discussion in this article about the types of claims filed against mediators reveals that many of them lack merit. Recall Clare's concern about the mediator's impartiality: "PS - I do not know how this mediator was chosen, likely by the ex's attorney."²²⁹ While an investigation may have revealed a conflict of interest between the mediator and her former spouse's attorney, it is more likely that Clare did not understand how the mediator had been chosen or what his or her disclosures about actual or potential conflicts

²²⁶ Conference Transcript, *supra* note 88, at 54.

²²⁷ Grievance Process Committee, Proposal on Maryland Mediator Grievance Ombuds Program 3 (July 2005) [hereinafter MGOP Proposal] (unpublished manuscript, on file with author). See discussion *infra* notes 814–47 and accompanying text.

²²⁸ Conference Transcript, *supra* note 88, at 21–22.

²²⁹ See Appendix A, *supra* note 2.

of interest may have meant or revealed. Thus, many claims may represent a misunderstanding of the ethical duties owed mediating parties. The early steps in a grievance system may have resolved Clare's suspicions about the ethical conduct of the mediator, and if not, she would have had an easy way to get them resolved by a third-party decision maker. Her mediator would undoubtedly appreciate the opportunity to explain his or her perspective on the situation. Moreover, he or she would no doubt learn something from the process that would improve his or her practice in future mediations. At the same time, neither party would have had to make a significant investment of time or money to reach resolution of the claim.

Some claims may represent generalized dissatisfaction with the mediator, the process, or the outcome. They may simply represent a party's sense that the mediator denied him or her procedural justice. It should come as no surprise that the leading claim filed in several states analyzed in this article concerned mediator interventions that undermined party self-determination.²³⁰ In the other states, the leading claim involved mediator neutrality. The first type of claim may relate to the "voice" given parties in mediation and perhaps to the respect shown parties by the neutral. The second leading claim relates to the perception of the mediator's ability to consider the party's views, concerns, and evidence in an even-handed way.²³¹

Anecdotally, the directors of the court-connected mediation programs in the states analyzed believe that the mediator complaint system provides unhappy parties a "voice," and for many, that seems to be all the parties need. Many of the informal and formal complaints lodged in these states are resolved—without intervention from any third-party decision maker—in a timely, cost effective way that supports the procedural justice values of

²³⁰ Welsh notes that practices like reducing the role of parties in mediation, showing a preference for evaluative interventions, and the abandonment or marginalization of joint sessions affect party self-determination and perceptions of procedural justice in potentially meaningful ways that might be expressed as complaints against mediators. Welsh, *Making Deals*, *supra* note 77, at 838–55; see also Welsh & McAdoo, *Look Before You Leap*, *supra* note 195, at 414.

Mediation is a largely informal and confidential process. . . . [M]ediator interventions often include evaluative techniques such as assessing the strengths and weaknesses of parties' cases, predicting court outcomes, and proposing possible settlement options. The mediators, however, are largely unregulated, and few courts operate rigorous monitoring systems, or any systems at all. The potential for coercion is very real

Id.

²³¹ See discussion *supra* notes 191–95 and accompanying text.

mediation. Too many other factors—difficulties of proof, mediator immunity, and limited damage recoveries—may better explain the paucity of malpractice claims. But we cannot easily dismiss the role grievance systems may play in protecting mediators from frivolous claims that they might otherwise have to defend in civil suits or in grievance proceedings before regulators of lawyers, therapists, and other professions of origin.

Leila Taaffe, the Director of the Georgia Office of Dispute Resolution, recently explained: “[A]s this profession grows . . . there will be lawsuits against mediators. . . . And a complaint procedure . . . can be a . . . first level [for] resolving [disputes] with the consumer so that they don’t want to go further, and it’s a signal to the community that we take what happens in mediation seriously.”²³²

E. Protecting the Lawyers Who Represent Parties in Mediation

Four of 21 claims filed against mediators that the leading insurance carrier handled alleged that the mediation led to a bad result.²³³ Mel Rubin calls these situations the “settle and sue” cases.²³⁴ He argues that they are on the rise. He also suggests that if a client is unhappy with the outcome of mediation, he or she is more likely to sue his or her attorney for malpractice. The attorney, in turn, is likely to bring the mediator into the suit as a co-defendant.²³⁵

Recall Clare’s concern about the pressure her attorney put on her:

I refused to sign several times. My attorney then began yelling at me to “shut-up and sign the damn thing” I wasn’t allowed to leave until it was signed The words, “NO I can’t sign this,” fell on deaf ears. I was so unfamiliar with the process of it all and what it meant and what the outcome entailed.²³⁶

To the extent the procedural justice research indicates that parties who perceive they have received procedural justice in mediation also perceive that the negotiated outcome in mediation is fair, we would expect that these parties are not likely to later sue their attorneys for malpractice. Even when the client has little trust in his or her attorney, a mediation process that

²³² Conference Transcript, *supra* note 88, at 10.

²³³ See discussion *supra* note 184 and accompanying text.

²³⁴ For biographical information about Mel Rubin, see discussion *supra* note 75.

²³⁵ Rubin & McGirney, *supra* note 54.

²³⁶ See Appendix A, *supra* note 2.

enhances procedural justice allows the party to assess directly whether he or she feels exploited or mistreated in the process.²³⁷ Even if the mediation process itself lacks procedural justice and the client accordingly remains dissatisfied and suspicious, a well-designed grievance system, emphasizing procedural justice from the client's perspective, may give the client the reassurances he or she needs. A client who suspects collusion between his or her lawyer and the neutral could seek the informed opinion of the regulatory body, without ever having to file a legal malpractice law suit.

Clearly, most of the benefits cited here have no direct empirical support. But that should not keep us, as a field, from fully implementing court-connected mediation programs, a component of which is a grievance system that offers parties the procedural justice the empirical research clearly suggests they expect.

VI. COMPARISON OF EXISTING STATE SPONSORED SYSTEMS REGULATING MEDIATORS WORKING IN COURT-CONNECTED PROGRAMS IN FIVE STATES

A. Introduction

Courts providing court-connected mediation services should ensure that mediators receiving court referrals deliver a high quality service consistent with ethical guidelines or rules.²³⁸ This section of the article discusses how

²³⁷ Hensler notes that clients disliked judicial settlement conferences because they were excluded from them and distrusted their attorney's descriptions of the discussions that occurred in them. Hensler, *supra* note 8, at 90–91.

²³⁸ NATIONAL STANDARDS, *supra* note 8, § 2.1 (court must monitor quality of mediators and mediation programs); § 2.6 (parties should have access to complaint mechanism); § 5.3 (court should conduct periodic evaluation of mediation programs); § 6.0 (courts must ensure quality of mediators' skills); § 6.5 (courts should monitor performance of mediators); § 6.6 (courts should remove from their rosters poorly performing mediators); § 8.1 (courts should adopt codes of ethics for mediators); § 14.0 (courts should not develop rules that protect mediators from liability); § 16.1 (courts should monitor mediation programs and provide sufficient resources for that task); CPR-Georgetown Commission, *supra* note 200, at 989 ("With the growth of voluntary and mandatory ADR use . . . the Drafting Committee believes it is essential to hold the ADR Provider Organizations . . . to the highest standards of quality and competence."). ADR Provider Organizations should require neutrals to adhere to an ethics code. *Id.* at 997; see also Margaret S. Herrman et al., *supra* note 43, *passim* (identifying several ways courts can assure mediator quality and analyzing the strengths and weaknesses of each choice); Posting of Ingo Keilitz, *Show Me the Data: Ten Good Reasons Why You Should Measure Court Performance* to Performance Standards, Measurements, and Management Room,

five states meet that responsibility.²³⁹

B. Florida's System of Regulation

1. History of Mediation Programs and the Regulatory System

In 1975, the Florida court system established the first Citizen Dispute Settlement (CDS) Center for court-ordered ADR.²⁴⁰ In the 31 years following the creation of that center, the state has created "one of the most comprehensive court-connected mediation programs in the country."²⁴¹ Currently, the state has 9 CDS programs, 49 county mediation programs (serving all 20 circuits), 45 family mediation programs, 13 circuit civil mediation programs, 40 dependency mediation programs, 3 arbitration programs, and 1 appellate mediation program.²⁴²

National Center for State Courts,
http://www.ncsconline.org/d_icm/readingrm/icmerroom_keilitz2.htm (Aug. 2001)
 (among other benefits, monitoring mediation programs suggests better practices); Welsh & McAdoo, *Look Before You Leap*, *supra* note 195, at 414, 426–27 (noting that mediators are largely unregulated and only a few courts operate any systems to monitor mediator or court-connected mediation programs; recommending that courts establish monitoring and evaluation mechanisms to ensure high-quality mediator performance; suggesting courts adopt ethical requirements for mediators and create an easily-accessible grievance process); Donna Stienstra, *Monitoring and Evaluating a Court ADR Program*, prepared for the Mini-Conference on Court ADR, ABA Section of Dispute Resolution Conference (Mar. 20, 2003) (on file with author) (identifying a four-step process for monitoring and evaluating court-connected mediation programs); Wissler & Rack, *Participant Questionnaires*, *supra* note 42, at 229–30 (empirical research examining attorneys' assessment of mediator performance in one court-connected program); Nancy Welsh, *Thinning Vision*, *supra* note 97, at 34–59, Appendix (analyzing ethics codes adopted by Florida and Minnesota).

²³⁹ I am grateful to each program director for their assistance in helping me understand the history and structure of the current court-connected mediation programs in the states analyzed. I apologize in advance for any errors I have made in conveying their comments on these subjects.

²⁴⁰ Florida State Courts, Alternative Dispute Resolution,
http://www.flcourts.org/gen_public/adr/adrintro.shtml (last visited Mar. 2, 2006).

²⁴¹ *Id.*

²⁴² *Id.*; see also FLA. STAT. ANN. § 44.102 (West 2005) (governing court-ordered mediation), available at http://www.flcourts.org/gen_public/adr/chapter44.shtml. See generally Alison E. Gerencser, *Alternative Dispute Resolution Has Morphed into Mediation: Standards of Conduct Must be Changed*, 50 FLA. L. REV. 843, 852–55 (1998) (describing the Florida training requirements and mediator intervention styles used in county, family and circuit court cases); Sharon Press, *Institutionalization: Savior or*

In 1986, the Supreme Court of Florida and the Florida State University College of Law established the Dispute Resolution Center (DRC) as Florida's "first state wide center for education, training, and research in the field of alternative dispute resolution."²⁴³ The DRC also provides assistance to the state courts in developing alternatives to the traditional court system. It sponsors an annual conference for mediators and arbitrators, publishes a newsletter for neutrals in the state, provides training for neutrals, and assists the local courts as needed.²⁴⁴ In 1988, the Florida Supreme Court created the Committee on Mediation and Arbitration Training, and a year later it created the Committee on Mediation and Arbitration Rules.²⁴⁵ The rules committee drafted the initial standards of conduct and the grievance process after engaging in a collaborative process that involved a series of state-wide public hearings. During the hearings, practicing mediators and other persons with a stake in the rules provided information to the committee.²⁴⁶ In addition, the committee looked to the ethics codes developed by other state supreme courts or professional organizations. In May 1992, the Florida Supreme Court adopted two sets of rules resulting from that effort—rules governing qualifications, ethics, and discipline.²⁴⁷ It also moved the qualifications rules from the Florida Rules of Civil Procedure to the DRC Rules for Mediators.²⁴⁸ Since that time, the Florida mediation community has continued to revise the ethics rules. The standards adopted in 2000 reflected the information gathered in additional public hearings and through a nation-

Saboteur of Mediation?, 24 FLA. ST. U. L. REV. 903, 907–15 (1997) (describing Florida's court-connected dispute resolution programs).

²⁴³ Florida State Courts, The Florida Dispute Resolution Center, http://www.flcourts.org/gen_public/adr/brochure.shtml (last visited Mar. 2, 2006).

²⁴⁴ *Id.*

²⁴⁵ E-mail from Sharon Press, *supra* note 89.

²⁴⁶ *Id.* Stakeholders generally supported the disciplinary rules because they wanted to show mediation consumers that a remedy exists if they have a bad experience in mediation. Telephone Interview with Sharon Press, *supra* note 89.

²⁴⁷ FLA. RULES FOR CERTIFIED AND CT. APPOINTED MEDIATORS, R. 10.100–10.900 (West 2005), available at http://www.flcourts.org/gen_public/adr/certrules.shtml [collectively hereinafter FLA. RULES FOR MEDIATORS]. These rules consist of three parts: Mediator Qualifications, *infra* note 282, Standards of Professional Conduct, *supra* note 48, and Discipline, *infra* note 251. In 1991, the Supreme Court of Florida commissioned the Florida Supreme Court Standing Committee on Mediation and Arbitration Rules to research and draft the rules that the court eventually adopted. FLA. RULES FOR MEDIATORS, *supra* at Committee Notes to R. 10.200. The Standing Committee's comments appear at the end of each rule. *Id.* The drafting history appears at the Committee Notes to R. 10.200.

²⁴⁸ Telephone Interview with Sharon Press, *supra* note 74.

wide effort to collect drafts of other ethics codes, to elicit comments to the drafts, and to engage in an extensive re-drafting process.²⁴⁹ Florida is now engaged in yet another revision process, primarily focused on the certification requirements.²⁵⁰

2. Organizational Structure of the Regulatory Entities

Six volunteer bodies and the Florida Supreme Court perform the duties arising under the qualifications, ethics, and disciplinary rules of the Florida Supreme Court.²⁵¹ First, three divisions—located in north, central, and south Florida—make-up the Mediator Qualifications Board (MQB).²⁵² Each division of the MQB consists of three circuit or county judges, three certified county mediators, three certified circuit mediators, three certified family mediators at least (two of which are non-lawyers), at least one, but not more than three certified dependency mediators, and three attorneys licensed to practice in Florida who are not certified mediators.²⁵³ The chief justice of the Florida Supreme Court makes appointments to the un-paid MBQ positions for staggered four-year terms.²⁵⁴

The MQB is the umbrella organization primarily responsible, through committees or hearing panels formed from its membership, for responding to matters involving mediator qualifications, ethics, or moral character. It is a

²⁴⁹ E-mail from Sharon Press, *supra* note 89.

²⁵⁰ The Supreme Court of Florida is currently in the process of amending the rules yet again. The comment period for the proposed rules ended Aug. 1, 2005. *See* Florida State Courts, Proposed Revisions to Mediator Qualifications, http://www.flcourts.org/gen_public/adr/revisions_proposed.shtml/ (last visited Mar. 2, 2006) and discussion *infra* note 288 and accompanying text.

²⁵¹ FLA. RULES FOR MEDIATORS, *supra* note 238, R. 10.720. The disciplinary portion of the rules appears at FLA. RULES FOR CERTIFIED AND CT. APPOINTED MEDIATORS, R. 10.700–10.880 (West 2005) [hereinafter FLA. DISCIPLINE RULES].

²⁵² *Id.* R. 10.730(a); *see also* Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 719–23 (1994) (describing Florida's enforcement standards of professional conduct and the mediator complaint process).

²⁵³ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.730(b). The three attorneys must have substantial trial practice. They cannot be certified as mediators or judicial officers during their terms on the board. At least one of the attorneys must have substantial experience in the dissolution of marriages. *Id.* R. 10.730(b)(6). It has become increasingly difficult to find experienced trial or family law attorneys to serve on the MQB who are not also certified mediators. Telephone Interview with Sharon Press, *supra* note 89.

²⁵⁴ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.730(c).

large body consisting of 51 members drawn from the state's judges, lawyers, and mediators in the three regions of Florida. The MQB responds directly to referrals from the DRC staff when the staff has information reflecting negatively on an applicant's or a certified mediator's good moral character.²⁵⁵ It conducts an investigation which may result in the approval of the applicant or the dismissal of the complaint against the certified mediator.²⁵⁶ Alternatively, it may refer the matter to a hearing panel.²⁵⁷ The situations typically leading to a hearing panel review include the suspension or revocation of a mediator's certification, or when the mediator receives professional discipline from an organization to which the mediator belongs.²⁵⁸ The hearing panel may dismiss the complaint, approve the application for certification, or sanction the mediator.²⁵⁹

Second, the Mediation Training Review Board considers complaints against certified mediation training programs.²⁶⁰ Members include judges and mediators.²⁶¹ The members meet in complaint committees and hearing panels.²⁶²

Third, one member from each MBQ division serves as a member of the Qualifications Complaint Committee (QCC) for a one-year period. The QCC is composed of one judge or attorney, who serves as chair, and two certified mediators.²⁶³ The QCC handles complaints relating to a mediator's moral character in the context of the initial application to the roster, on-going certification, or re-certification.²⁶⁴ Complaints about an applicant's or mediator's moral character may arise during the application process when the staff of the DRC suspects the good moral character of the applicant. The complaints may also pertain to certified mediators when the staff receives information suggesting a lack or lapse of good moral character.²⁶⁵ Finally, this committee may receive a complaint that relates to the professional

²⁵⁵ *Id.* R. 10.800(a)(1)–(2).

²⁵⁶ *Id.* R. 10.800(a)(3).

²⁵⁷ *Id.*

²⁵⁸ Telephone Interview with Sharon Press, *supra* note 89.

²⁵⁹ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.800(a)(4).

²⁶⁰ The Florida Dispute Resolution Center, *supra* note 243.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.730(e).

²⁶⁴ *Id.* R. 10.800(a)(1).

²⁶⁵ *Id.* R. 10.800(a)(1)–(2).

discipline of a mediator by his or her profession of origin or other professional organization.²⁶⁶

Fourth, Florida is the only state analyzed in this article that has created a Mediator Ethics Advisory Committee (MEAC).²⁶⁷ The MEAC writes and publishes ethics opinions in response to questions posed by practicing mediators, lawyers, judges, and the public. It interprets the standards of conduct and issues opinions "consistent with supreme court decision on mediator discipline."²⁶⁸ The members of the MEAC are distinct from the members of the MQB to ensure that its members will not also be asked to handle formal complaints filed against mediators.²⁶⁹ Its opinions, some 96 to date, appear at the easily accessible "Florida State Courts" website.²⁷⁰

Nine people serve on the MEAC, with three coming from each region served by the MQB.²⁷¹ One county mediator, one family mediator, and one circuit mediator from each MQB division also sit on the MEAC. The chief justice of the Florida Supreme Court appoints its unpaid members. At least one of the nine mediators must be a dependency mediator. Members serve four-year terms. No member may serve more than two consecutive terms.²⁷²

Fifth, the DRC uses the MBQ pool of volunteers to create complaint committees that handle the ethics complaints received by the DRC against mediators. Each complaint committee consists of three members: one judge or attorney, who acts as the chair and the due process watch dog; one mediator who is certified in the area to which the complaint refers; and one other certified mediator. A complaint committee ceases to exist after it disposes of the complaints assigned to it.²⁷³

Sixth, complaint committees may refer complaints against mediators to a hearing panel composed of five members: one circuit or county judge, who serves as the chair and the due process watchdog; three certified mediators, at

²⁶⁶ *Id.* R. 10.800(b).

²⁶⁷ FLA. RULES FOR MEDIATORS, *supra* note 247, R. 10.900. Georgia and North Carolina also provide ethics opinions, but a separate committee does not issue them. Instead, the program directors provide the guidance. See discussion *infra* notes 302–05, 312, 315 and accompanying text.

²⁶⁸ FLA. RULES FOR MEDIATORS, *supra* note 247, R. 10.900(a). See discussion *supra* notes 302–05 and accompanying text.

²⁶⁹ FLA. RULES FOR MEDIATORS, *supra* note 247, R. 10.900(b). Telephone Interview with Sharon Press, *supra* note 89.

²⁷⁰ Florida State Courts, Mediator Ethics Advisory Committee Opinions, http://www.flcourts.org/gen_public/adr/opinions.shtml (last visited Mar. 2, 2006).

²⁷¹ FLA. RULES FOR MEDIATORS, *supra* note 247, R. 10.900(b).

²⁷² *Id.* R. 10.900(c).

²⁷³ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.730(d).

least one of whom must be certified in the practice area in which the complaint arises; and one attorney.²⁷⁴ Like the complaint committees, the hearing panels cease to exist after disposing of all assigned cases.²⁷⁵ Persons cannot serve on both the complaint committee and the hearing panel in the same mediator complaint case. The hearing panels provide an adjudicatory function and cannot conduct investigations of complaints.²⁷⁶

The DRC provides staff support to these entities.²⁷⁷ A dedicated court filing fee, held in trust, supports all the DRC's responsibilities and functions.²⁷⁸ The trust account includes mediator certification fees, which only cover a third or less of the costs of the program administration.²⁷⁹

None of the members of these regulatory entities are lay persons.²⁸⁰ The entities do include members who represent "consumers" of mediation services, because they include lawyers and judges.²⁸¹

3. *Barriers of Entry to the Field*

The Florida DRC Rules for Certified and Court Appointed Mediators set qualifications for four categories of mediators: county court mediators,²⁸²

²⁷⁴ *Id.* R. 10.730(f).

²⁷⁵ *Id.*

²⁷⁶ *Id.* R. 10.740(c).

²⁷⁷ The Florida Dispute Resolution Center, *supra* note 243.

²⁷⁸ Telephone Interview with Sharon Press, *supra* note 89.

²⁷⁹ Telephone Interview with Sharon Press, *supra* note 74.

²⁸⁰ The author uses the term "lay" in this context as not including members of the court administrative system, judges, lawyers, or mediators.

²⁸¹ *Id.* The Director of Florida's DRC explains that a lay person would likely have difficulty analyzing the Florida Standards of Conduct, *supra* note 48, as they apply to allegations of mediator misconduct without experience in the mediation process as a lawyer, judge, or mediator. Telephone Interview with Sharon Press, *supra* note 74.

²⁸² FLA. RULES FOR CERTIFIED AND CT. APPOINTED MEDIATORS, R. 10.100–10.110 (West 2005) [hereinafter FLA. MEDIATOR QUALIFICATIONS RULES]. County mediator applicants must complete at least 20 hours of training in a program certified by the Florida Supreme Court. *Id.* R. 10.100(a)(1). They must also observe four county court mediations conducted by a certified mediator and conduct four mediations under the supervision of a certified mediator. *Id.* R. 10.100(a)(2). They must also show good moral character. *Id.* R. 10.100(a)(3). The Supreme Court of Florida will likely soon adopt proposed changes to the Mediator Qualifications Rules. *See* discussion *infra* note 288 and accompanying text.

family mediators,²⁸³ circuit court mediators,²⁸⁴ and dependency mediators.²⁸⁵ Persons completing the training requirements become “certified” and may join the roster for court-appointed mediation referrals. The training hours currently required for certification in all the categories are similar to training requirements in most states and represent reasonably low barriers of entry to the field.²⁸⁶ Florida, unlike most other states in the United States, requires

²⁸³ Those seeking certification to mediate family matters and dissolution of marriages must complete a minimum of 40 hours in a certified family mediation training program. FLA. MEDIATOR QUALIFICATIONS RULES, *supra* note 282, R. 10.100(b)(1). They must also hold a master’s degree or doctorate in social work, mental health, or behavioral sciences, or be a physician certified to practice psychiatry, an attorney, or a licensed certified public accountant. *Id.* R. 10.100(b)(2). Alternatively, they may be an attorney or a certified public accountant licensed to practice in any jurisdiction in the United States. *Id.* All applicants must also have a minimum of four years practical experience in one of those fields or have eight years of family mediation experience (with a minimum of ten mediations per year). *Id.* Additionally, they must observe two family mediations conducted by a certified family mediator and conduct two family mediations under supervision and observation of a certified family mediator. Finally, they must be of good moral character. *Id.* R. 10.100(b)(3).

²⁸⁴ Circuit court mediation applicants must complete a minimum of 40 hours in a certified circuit court mediation training program. FLA. MEDIATOR QUALIFICATIONS RULES, *supra* note 282, R. 10.100(c)(1). They must also be members in good standing of the Florida Bar with at least five years of Florida practice and be an active member of the Florida Bar within one year of application for certification. *Id.* R. 10.100(c)(2). Alternatively, they may be trial judges from any U.S. jurisdiction who were members of the bar in which the judges presided for at least five years immediately preceding the year that certification is sought. *Id.* They must observe two circuit court mediations conducted by certified circuit mediators and conduct two circuit mediations under the supervision and observation of certified circuit court mediators. Finally, they must be of good moral character. *Id.* R. 10.100(c)(4).

²⁸⁵ Dependency mediators handle matters involving abused and neglected children. FLA. MEDIATOR QUALIFICATIONS RULES, *supra* note 282, R. 10.100(d). Persons seeking this certification must complete a supreme court certified dependency mediation training program. *Id.* R. 10.100(d)(1). They must have a master’s degree or doctorate in social work, mental health, behavioral sciences, or be a physician licensed to practice adult or child psychiatry or pediatrics. *Id.* R. 10.100(d)(2). The current rules also permit certification of an attorney with four years experience in family and/or dependency issues, a licensed mental health professional with at least four years practical experience, or certified family or circuit mediators with a minimum of 20 mediations. *Id.* Additionally, the rules require applicants to observe four dependency mediations conducted by certified dependency mediators and to conduct two dependency mediations under the supervision and observation of certified dependency mediators. *Id.* R. 10.100(d)(3). Lastly, they must be of good moral character. *Id.* R. 10.100(d)(4).

²⁸⁶ See N. VA. MEDIATION SERV., U. S. MEDIATOR CERTIFICATION STANDARDS: A DIGEST OF STATE-WIDE REQUIREMENTS FOR COURT MEDIATORS *passim* (Cindra Rehman

professional degrees or advanced professional training for three of the mediation certifications. In addition, like Virginia, it imposes both an observation requirement and a supervised mediation or co-mediation requirement for all four types of certifications. Taken together, Florida imposes stricter barriers of entry than most other states for mediators seeking to work in the court-connected programs.²⁸⁷

The Supreme Court of Florida is currently considering a revision of the rules governing mediator qualification. The Supreme Court Committee on ADR Rules and Policy has proposed a point system, which allows mediators to accrue points towards the qualification requirements in a number of ways. Applicants for each type of certification would have to accrue 100 points. For county court mediators, an applicant would need 30 training points, 10 points reflecting the applicant's prior education, and 60 mentorship points that accrue at 10 points for each fully, completed supervised mediation and 5 points for each observation. The other certifications will also require 100 points, but the points accrue in different ways depending on the type of certification an applicant seeks. Mediators can accrue additional points for holding other professional licenses, having the ability to speak a foreign language, and completing a graduate level program in a conflict resolution certificate program.²⁸⁸ The proposed rules, however, do not require persons to have particular professional backgrounds as currently required for some certifications. This point system approach to certification no doubt reflects Florida's long experience with the certification process. It will no doubt generate a great deal of conversation in the mediation field.

The Florida rules impose yet another barrier to entry not required in most states. It requires that all applicants and any certified mediators show evidence of good moral character. The rules' drafters intend that the "good moral character" requirement will protect the participants in mediation and the public. The requirement also "safeguard[s] the justice system."²⁸⁹ In determining good moral character, the DRC considers prior felony

& Richard Mayden eds., 2003) (obtainable from the Northern Virginia Mediation Service, 4260 Chain Bridge Road, Suite A-2, Fairfax, VA 22030) [hereinafter DIGEST OF STATE-WIDE REQUIREMENTS FOR COURT MEDIATORS] (on file with author); *see also* Pou, *Assuring Excellence*, *supra* note 32, at 325–28.

²⁸⁷ *See* DIGEST OF STATE-WIDE REQUIREMENTS FOR COURT MEDIATORS, *supra* note 286, *passim*.

²⁸⁸ Supreme Court of Florida, Proposed Order Rules Governing Certification of Mediators, No. AOSC, 2–7 (2005) [hereinafter Proposed Sup. Ct. Adm. Order], www.flcourts.org/gen_public/adr/bin/adr_adminorder.pdf; *see also* Qualifications for Mediators Chart, http://www.flcourts.org/gen_public/adr/bin/chart.pdf.

²⁸⁹ FLA. MEDIATOR QUALIFICATION RULES, *supra* note 269, R. 10.110(b).

convictions until restoration of civil rights and probation sentences until termination of the probation period.²⁹⁰ In reviewing an applicant's disclosures, the MBQ also considers the following factors:

[T]he extent to which the conduct would interfere with a mediator's duties and responsibilities; . . . the area of mediation in which certification is sought . . . the factors underlying the conduct . . . the applicant's age at the time of conduct; . . . the recency of the conduct; . . . the reliability of the information concerning the conduct; . . . the seriousness of the conduct as it relates to mediator qualifications; . . . the cumulative effect of the conduct or information; . . . any evidence of rehabilitation; . . . the applicant's candor during the application process; . . . and disbarment or suspension from any profession.²⁹¹

The proposed revisions to the qualification rules retain the good moral character requirement.²⁹²

By Administrative Order, the Florida Supreme Court has imposed continuing mediator education (CME) requirements on all certified mediators.²⁹³ It requires certified mediators to complete 16 hours of CME, including 4 hours of ethics training, each two-year certification renewal cycle. Family and dependency mediators must include four hours of domestic violence training in that minimum requirement. Mediators certified in more than one area must satisfy the CME requirements for each certification. Renewing mediators may double count CME hours if they relate to any other certification sought. Mediators may also count continuing education hours

²⁹⁰ *Id.* R. 10.110(c)(2).

²⁹¹ *Id.* R. 10.110(c)(4).

²⁹² Sup. Ct. Comm. on ADR Rules and Policy, PROPOSED AMENDMENTS TO FLORIDA RULES FOR CERTIFIED AND COURT APPOINTED MEDIATORS, R. 10.110 (proposed May 11, 2005) [hereinafter FLORIDA PROPOSED RULES], available at http://www.flcourts.org/gen_public/adr/bin/adr_amendrule.pdf

²⁹³ Proposed Sup. Ct. Adm. Order, *supra* note 288, at 9–12. The order explains the types of trainings and formats that will satisfy its requirements. The mediator must attend live trainings for at least half the required hours, but some video-taped or internet trainings may satisfy the requirements under certain circumstances. Mediators may also earn a maximum of four hours of CME credit through mentored activities. *Id.* at 10. The order does not allow mediators to carry forward extra CME hours into the next recertification cycle. The DRC may report any misrepresentations on the CME Reporting Form to the MQB. *Id.* at 16. The CME Reporting Form is available at the website of the Florida Academy of Professional Mediators, Inc., http://www.tfapm.org/education_form.shtml. The Florida State Courts' website provides a link to it at http://www.flcourt.org/gen_public/adr/cmeindex.shtml.

required by their profession of origin, except ethics hours, if the training “directly bears” on the mediator’s practice.²⁹⁴ Under the proposed qualification rules, renewing mediators will need two hours of domestic violence training and one hour of diversity/cultural awareness training, except for family and dependency mediators, who will still need four hours of domestic violence training.²⁹⁵

In summary, Florida currently imposes relatively low barriers of entry to the field, but requires certified mediators to commit to the field and their skill development by requiring them to renew every two years after satisfying additional training requirements.

4. *Ethics Code and Advisory Opinions*

Florida has had an ethics code for certified mediators since 1992.²⁹⁶ The Florida Supreme Court Standing Committee on ADR Rules explained that the field’s experience with the rules led to a revision process beginning in 1998. The Committee Notes explain:

By 1998, several other states and dispute resolution organizations initiated research into ethical standards for mediation which also became instructive to the Committee. In addition, Florida’s Mediator Qualifications Advisory Panel [now the MEAC], created to field ethical questions from practicing mediators, gained a wealth of pragmatic experience in the application of ethical concepts to actual practice that became available to the Committee. Finally, the Florida Mediator Qualifications Board, the disciplinary body for mediators, developed specific data from actual grievances filed against mediators over the past several years, which also added to the available body of knowledge.

Using this new body of information and experience, the Committee undertook a year long study program to determine if Florida’s ethical rules for mediators would benefit from review and revision

. . . [T]he Rules were reorganized into four substantive groups which recognized a mediator’s ethical responsibilities to the “parties,” the “process,” the “profession,” and the “courts” The Committee recognizes [that] many rules overlap and define specific ethical

²⁹⁴ *Id.* at 10–12.

²⁹⁵ *Id.* at 10.

²⁹⁶ See generally Nancy A. Welsh, *Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 420, 429–34 (Jay Folberg, Ann L. Milne, & Peter Salem eds., 2004) (describing Florida’s approach to protecting party self-determination through its ethics rules).

responsibilities which impact more than one area. Clearly, a violation of a rule in one section may very well injure relationships protected in another section.²⁹⁷

The efforts of the Standing Committee on ADR Rules resulted in the 2000 revision of the Florida Standards of Conduct.²⁹⁸ The drafters intended that the rules guide mediators and instill public confidence in the mediation process. The first rule states: "The public's use, understanding, and satisfaction with mediation can only be achieved if mediators embrace the highest ethical principles."²⁹⁹ The rules apply to certified and court-appointed mediators.³⁰⁰ The Supreme Court Committee on ADR Rules and Policy recommended in May 2005 only minor revisions to the Florida Standards of Conduct that affect the rules on confidentiality and immunity.³⁰¹

As noted above, a completely separate committee—the MEAC—provides written advisory opinions consistent with the Florida Supreme Court decisions on mediator discipline that respond to mediators' ethical questions.³⁰² The public may easily access these opinions at the Florida State Court's website.³⁰³ The MEAC thus provides valuable interpretations of the Standards of Conduct.³⁰⁴ As noted above, its membership is distinct from the members of the MQB. The Florida Supreme Court did not want members of the advisory panel also serving in an investigatory or adjudicatory role in the complaint process. By bifurcating the roles, mediators need not fear that a question posed to the MEAC could result in an ethics complaint against the mediator.³⁰⁵

²⁹⁷ FLA. STANDARDS OF CONDUCT, *supra* note 48, R. 10.200 (comm. notes).

²⁹⁸ *Id.*

²⁹⁹ *Id.* R. 10.200.

³⁰⁰ The distinction between the two classes of mediators appears to contemplate mediators who are not certified, but may perform mediations in court-connected programs at the request of the parties and by appointment of the courts.

³⁰¹ See FLORIDA PROPOSED RULES, *supra* note 292, at 9–11.

³⁰² FLA. RULES FOR MEDIATORS, *supra* note 247, R. 10.900.

³⁰³ Mediator Ethics Advisory Committee Opinions, *supra* note 270. The website lists the opinions with a reference number and a short summary. A member of the public or a mediator may read the full opinions by clicking on the links. The full text includes the question presented, a summary of the opinion, the authority referenced, and the opinion. As of January 2006, the MEAC has issued nearly 100 advisory opinions.

³⁰⁴ See discussion *infra* notes 312, 315 and accompanying text.

³⁰⁵ Telephone Interview with Sharon Press, *supra* note 89.

5. Guidelines for Interacting with the Legal World

i. Confidentiality in Mediation

Confidentiality of mediation communications exists by statute and is reinforced by the Florida Standards of Conduct.³⁰⁶ The statutory protection applies to a broad category of mediation communications, unless the parties agree in writing to waive the coverage provided in whole or part. Unlike most states, the definition of a mediation communication includes nonverbal conduct, as well as oral and written communications.³⁰⁷ It requires mediation participants to keep communications confidential except between the parties or between a party and his or her counsel.³⁰⁸ It creates an evidentiary privilege by precluding mediation participants from testifying or requiring the mediator to testify at a subsequent adjudicatory proceeding.³⁰⁹ The statute sets out six exceptions to confidentiality, including

any mediation communication . . . (4) [o]ffered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding [and] . . . (6) [o]ffered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.³¹⁰

Thus, the confidentiality statute contemplates the possibility that unhappy parties may file a complaint against a mediator and that the party and the mediator will need to disclose confidences to support or defend a claim of unethical conduct. The statute also creates penalties for the knowing or willful disclosure of mediation communications in violation of the statute.³¹¹

³⁰⁶ FLA. STAT. ANN. § 44.401–.407 (West 2005). See FLA. STANDARDS OF CONDUCT, *supra* note 48, R. 10.360, 10.420 (governing confidentiality).

³⁰⁷ *Id.* § 44.403(1). It broadly defines the beginning and end of mediation to which the protection applies. A court-ordered mediation starts when the court issues the order to enter mediation and ends when the parties sign a full or partial settlement agreement; the mediator declares an impasse and reports to the court that the parties could not reach agreement; a court order, court rule, or other law terminates the mediation; or the mediation terminates by agreement of one or both parties. *Id.* § 44.404(1).

³⁰⁸ *Id.* § 44.405.

³⁰⁹ *Id.* § 44.405(2). It defines a “subsequent proceeding” as “an adjudicative process that follows a mediation, including related discovery.” *Id.* § 44.403(5).

³¹⁰ *Id.* § 44.405(4)(a)(4), (6).

³¹¹ *Id.* § 44.406(1).

The MEAC has issued 22 ethics advisory opinions answering questions about confidentiality in mediation. They cover disclosures to mediating parties of caucus communications and income data appearing on intake forms; disclosures to parties outside the mediation of threats to do harm to them; disclosures to the Florida Bar of the unethical behavior of attorneys who participate in mediation; or calls during the mediation to attorneys or other support persons who are not attending the mediation. They also cover the testimony of the mediator in subsequent proceedings or the disclosure of his or her notes. One opinion discusses, but fails to resolve, the mediator's duty to advise parties about possible exceptions to confidentiality. Finally, the advisory opinions cover permitted disclosures to the court about the outcome of or progress in a mediation, a party's bad faith participation, or a party's appearance without full settlement authority.³¹²

ii. *Unauthorized Practice of Law Guidelines and Mediator Immunity*

The DRC Director believes that mediators, who strictly comply with the Florida Standards of Conduct, will not face the problem of the unauthorized

³¹² See MEAC Op. 95-005 (Oct. 5, 1995) (caucus communications); Op. 95-003 (Oct. 5, 1995) (calls to non-parties during mediation); Op. 95-010 (Feb. 13, 1996) (calls to attorney's office during mediation); Op. 96-005 (Feb. 8, 1997) (verbal threats); Op. 97-008 (Oct. 7, 1997) (waiver of confidentiality rights to allow appearance on mediation TV reality show); Op. 97-009 (Dec. 24, 1997) (husband's income disclosed on intake form); Op. 97-006 (Dec. 24, 1997) (mental health professionals' duty to warn of threat to party or to others); Op. 99-002 (July 3, 1999) (permitted disclosure to court); Op. 99-003 (Aug. 23, 1999) (mediator's notes); Op. 99-012 (May 11, 2000) (testimony of mediator about parties' intent concerning unperformed mediation agreement); Op. 2000-002 (June 27, 2000) (exceptions to confidentiality found in U.S. Postal Service agreement to mediate that were inconsistent with confidentiality statute); Op. 2000-010 (Jan. 12, 2001) (definition of "disclosures required by law"); Op. 2001-002 (May 2, 2001) (mediator's testimony at lawyer's disciplinary hearing); Op. 2001-005 (June 1, 2001) (disclosure to Florida Bar of lawyer's unethical conduct in mediation); Op. 2001-008 (Nov. 6, 2001) (party request for affidavit from mediator about papers that "disappeared" in the mediation); Op. 2002-002 (Mar. 22, 2002) (duty to report to Florida Bar a lawyer's unlawful conduct in the mediation); Op. 2001-010 (Mar. 22, 2002) (report to court about party's failure to appear with full settlement authority); Op. 2003-003 (May 22, 2003) (notice to parties of statutory exceptions to confidentiality); Op. 2003-005 (July 31, 2003) (caucus communications); Op. 2003-008 (Oct. 22, 2003) (program statistical sheets); Op. 2003-007 (Dec. 4, 2003) (court form requiring parties to disclose basis for contesting claim or counterclaim); Op. 2004-006 (Jan. 17, 2005) (disclosure of party's good faith participation or failure to appear with full settlement authority) Mediation Ethics Advisory Committee Opinions, *supra* note 270.

practice of law, because the standards emphasize party self-determination and mediator impartiality.³¹³ Accordingly, the DRC has not attempted, as has Virginia and North Carolina, to outline the scope of the unauthorized practice of law under Florida law and legal ethics opinions.³¹⁴ The MEAC, however, has issued ten advisory ethics opinions relating to practices that could be deemed the unauthorized practice of law. Mediators have posed questions to the MEAC about giving legal advice in mediation, predicting how a specific judge would rule in the case, preparing for divorcing parties forms and pleadings the parties could then file with family courts, drafting the parties' settlement agreement, and the role of non-lawyers assisting *pro se* parties in mediation.³¹⁵ These opinions provide very specific and helpful advice. They also highlight how the question of the unauthorized practice of law may implicate other concurrently applicable professional rules.³¹⁶

The state legislature has also decided to create two types of immunity for mediators. A statute confers judicial immunity to the same extent as a judge on mediators serving in court-connected mediations and trainees meeting their observation and supervised mediation requirements. However, mediators serving in privately referred mediations have more limited immunity. The statute protects them from liability arising from the performance of the mediator's duties, so long as the mediators do not act in "bad faith, with a malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."³¹⁷ Thus, even if the disciplinary process results in a sanction against a mediator, a mediator

³¹³ Telephone Interview with Sharon Press, *supra* note 89.

³¹⁴ The DRC Director suggests that we should instead think of this issue as the "authorized practice of mediation" rather than the "unauthorized practice of law." Telephone Interview with Sharon Press, *supra* note 74.

³¹⁵ See MEAC Op. 95-002 (Oct. 5, 1995) (legal advice); Op. 96-003 (Jan. 2, 1997) (legal advice); Op. 99-004 (July 3, 1999) (non-lawyer party assistance); Op. 2000-009 (Feb. 19, 2001) (preparing settlement agreements); Op. 2001-004 (May 2, 2001) (legal advice); Op. 2001-003 (May 2, 2001) (preparing forms and pleadings); Op. 2001-011 (April 4, 2002) (legal advice); Op. 2003-002 (May 22, 2003) (legal advice); Op. 2004-004 (Jan. 17, 2005) (preparing settlement agreement, forms, and pleadings); and Op. 2004-001 (May 14, 2004) (predicting how a specific judge would rule) Mediation Ethics Advisory Committee Opinions, *supra* note 270.

³¹⁶ FLA. STANDARDS OF CONDUCT, *supra* note 48, R. 10.650 ("Other ethical standards to which a mediator may be professionally bound are not abrogated by these rules. In the course of performing mediation services, however, these rules prevail over any conflicting ethical standards to which a mediator may otherwise be bound.")

³¹⁷ FLA. STAT. ANN. § 44.107 (West 2005).

would still have complete or partial immunity to a negligence suit or other effort to hold him or her civilly liable for his or her misconduct.³¹⁸

6. *Public Oversight of Florida Mediators Through a Complaint System*

i. *Introduction*

Florida was the first state to implement a process allowing unhappy mediation parties to file and pursue complaints against mediators for practices that violated the Florida Standards of Professional Conduct. The Florida Disciplinary Rules³¹⁹ therefore create one more way for the Florida Supreme Court to ensure the quality of service provided by certified mediators. The Florida Disciplinary Rules allow the investigation of complaints, create informal and formal processes for resolving complaints, and permit the imposition of sanctions against mediators, including their removal from the certified court list, if they do not meet the standards of skill or professionalism expected by the court. Florida has evolved a disciplinary process, based on its experience with filed complaints that provides more due process protections for mediators than any other state system. In fact, the fourth complaint filed against a mediator led to the development of the probable cause step in the process, described below.³²⁰ While the description of the process suggests that it is linear in nature, the parties involved may loop back to early steps in the process to resolve a complaint.³²¹

The Florida Disciplinary Rules apply to certified mediators doing either court-ordered or privately-referred cases and to non-certified mediators doing court-ordered mediations.³²²

ii. *Staff Function: Complaint Intake Process*

In Florida, any person wishing to make a complaint alleging a violation of the Florida Standards of Conduct may do so in writing under oath.³²³ The

³¹⁸ Conference Transcript, *supra* note 88, at 33.

³¹⁹ FLA. DISCIPLINE RULES, *supra* note 251, R.10.700–10.880.

³²⁰ Telephone Interview with Sharon Press, *supra* note 89.

³²¹ *Id.*

³²² FLA. DISCIPLINE RULES, *supra* note 251, R. 10.700.

³²³ Parties may not file complaints anonymously. Conference Transcript, *supra* note 88, at 35. As of October 2003, mediation parties filed 47 of the complaints and attorneys filed eight of the complaints. *Id.* at 36. Florida does not impose a statute of limitations by

complaint must state specific facts that form a basis for the violation.³²⁴ Mediation participants may file these complaints with the DRC or in the office of the court administrator in the circuit where the alleged misconduct occurred.³²⁵ When an unhappy party files a complaint in the office of the court administrator, the administrator refers the case to the DRC within five days of its filing.³²⁶ If the unhappy party files the complaint in a form acceptable under the Florida Disciplinary Rules, the DRC assigns the complaint to a complaint committee within ten days.³²⁷

which parties must file complaints. However, most parties file a complaint within a couple of months of the completed mediation. *Id.* at 16–17. However, unlike the Virginia rules, the Florida Disciplinary Rules do not prevent a party from filing a complaint before the mediation session has ended. *Id.* at 34; *see also* discussion *infra* note 428 and accompanying text.

³²⁴ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.810(a). Unlike Virginia and Minnesota, the director of the program does not get party evaluations of mediators that may provide an additional way of monitoring mediator conduct or which may serve as an independent basis for pursuing a complaint against a mediator. Conference Transcript, *supra* note 88, at 19. *See* discussion *infra* notes 423–27, 741–42 and accompanying text. ADR program directors in each circuit court may get complaints about mediators, but those complaints would only trigger a local, rather than state-level, investigation of the complaint. Telephone Interview with Sharon Press, *supra* note 74. Unlike Maine, Florida's DRC staff members do not have the time or resources to observe the over 5,000 certified mediators in the state. Accordingly, observation would not lead to a disciplinary proceeding. More importantly, Florida's DRC staff does not want that responsibility. The Director of Florida's DRC has noted: "I can't imagine in Florida me . . . walking up to a mediator and saying . . . 'Okay. I'm sorry . . . I've written you up on a couple of these [Standards of Conduct] that I don't think that you did, so I'm . . . pulling your ticket.' So, it's really a stark . . . stark difference [from Maine's approach]." Conference Transcript, *supra* note 88, at 48–49. If the Director of Florida's DRC had de-rostered mediators in Florida at the rate Maine has de-rostered mediators (6 of approximately 140 mediators), over 200 of Florida's 5300 mediators would no longer be certified. *See* discussion *supra* notes 87, 160, 178–79 and accompanying text.

³²⁵ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.810(b). As of October 2003, Florida had also processed 40 complaints relating to a mediator's good moral character. Conference Transcript, *supra* note 88, at 10. This article does not discuss either type of complaint, but focuses instead on complaints relating to the Florida Standards of Conduct.

³²⁶ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.810(c).

³²⁷ *Id.* R. 10.810(d). The DRC staff checks to see that the complaint discloses the name of the complainant, the name of the mediator, that the complaint committee has jurisdiction of the matter because the mediator is certified or was engaged in a court-ordered mediation, and is notarized. It also begins the process of identifying the rules of the Florida Standards of Conduct the mediator may have violated. Telephone Interview with Sharon Press, *supra* note 89.

Unhappy parties, however, may have difficulty finding the Florida Disciplinary Rules and other information about filing a complaint. As of August 2005, the Florida State Courts' website did not dedicate a tab to disciplinary matters. The Florida Disciplinary Rules appear as the third part of the rules described on the webpage as "Rules for Mediators." Thus, an unhappy party could easily overlook them. And, unlike Virginia, Georgia and Minnesota,³²⁸ the DRC did not make complaint forms available on the webpage.³²⁹ Finally, while the DRC posts ethics advisory opinions at a dedicated tab on the webpage, it makes the summary of grievances against mediators available in electronic format on request.³³⁰ Taken together, however, the public has access to more ethics related material at the court's website than any other state analyzed, except Virginia.

iii. *Complaint Committee Function: Facial Sufficiency Analysis of the Complaint*

The Florida Disciplinary Rules provide several steps in the grievance process that protect mediators from frivolous claims. One step requires the complaint committee to meet in person or by conference call to determine whether the allegations, if true, would constitute a violation of the rules.³³¹ In other words, the committee evaluates the facial sufficiency of the complaint based solely on the allegations in the complaint.³³² If the complaint

³²⁸ See discussion *infra* notes 434, 543, 655 and accompanying text.

³²⁹ The DRC Director recently advised the author that the DRC had added a complaint form to its website. Telephone Interview with Sharon Press, *supra* note 74. However, a search of the website does not show its posting and even if it is posted, mediation parties would have a difficult time finding it. See Fla. St. Cts., Court Programs and Initiatives, Alt. Disp. Resol., http://www.flcourts.org/gen_public/adr/index.shtml (last visited Mar. 2, 2006). Sharon Press, the Director of Florida's DRC, acknowledges that regulators could require mediators to advise parties about the availability of the complaint process. Conference Transcript, *supra* note 88, at 18. Virginia comes closest to imposing this requirement in a footnote to the Complaint Procedures that requires as follows: "At the start of each mediation, the mediator should ensure that the parties and the mediator sign a waiver of confidentiality with respect to any investigation arising out of a complaint against the mediator." Complaint Procedures, *supra* note 128, at 4 n.1. See discussion *infra* notes 483-86 and accompanying text. One could anticipate that a discussion of this waiver would lead to a broader discussion about the complaint process.

³³⁰ E-mail from Sharon Press, *supra* note 89. Thus, these important learning tools may not get the public exposure they deserve.

³³¹ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.810(e).

³³² *Id.* In Florida, unlike the other states analyzed in this article, Florida's DRC staff makes no determinations about the facial sufficiency of the complaint.

committee finds that a complaint against a certified mediator is facially insufficient, the complaint committee dismisses the complaint without prejudice. The DRC staff notifies the complainant and the mediator of the dismissal.³³³

iv. *Complaint Committee or Investigator Functions:
Investigation, Dismissal, or Informal Resolution of the
Complaint*

If the complaint committee finds the complaint facially sufficient, the committee then prepares a list of any rules that the mediator may have violated. It submits the list to the DRC.³³⁴ The DRC then sends a copy of the committee's list of rule violations, a copy of the complaint, a copy of the Florida Standards of Conduct, and the Florida Disciplinary Rules to the mediator.³³⁵ As the DRC Director has explained, "[Y]ou can't think about . . . grievances in the abstract. They relate to standards of conduct . . ." She further explained:

[T]hat's one of the lessons we learned over time [when] the complaint just went out [to the mediator] as written. And that's why we added in the step that it goes first to the complaint committee. [Its members] identify which rules were violated. Because what was happening [was] the mediator would get . . . some complaints [that were] like way all over the map . . . [The mediator would say:] 'I'm not even sure what I should be responding to,' and what they responded to turn[ed] out [not to be the concern of the complaint committee]. So now we identify the rules . . . we would like [the mediator] to respond to . . ." ³³⁶

The Florida Disciplinary Rules require the mediator to respond to the complaint and the list of rule violations within 20 days of the receipt of the mailing from the DRC. The mediator must supply a sworn written response.

³³³ *Id.* This contact will be one in a series of contacts with the complaining party. As the Director of Florida's DRC has noted: "In Florida, we also always notify the complainant, and . . . it's very interesting because our complainants . . . want to know [what is going on] . . . and I find it . . . useful to . . . keep them in the loop They want to make sure that [the complaint has] not just been . . . dropped somewhere along the line." Conference Transcript, *supra* note 88, at 50.

³³⁴ *Id.*

³³⁵ *Id.*; FLA. DISCIPLINE RULES, *supra* note 251, R. 10.810(f).

³³⁶ Conference Transcript, *supra* note 88, at 29–30.

If the mediator fails to respond, the complaint committee considers the allegations in the complaint admitted.³³⁷

The complaint committee then reviews the complaint and response. Based on the additional information, it may dismiss the complaint if it finds no violation of the Florida Standards of Conduct.³³⁸ The complaint committee can also hire an investigator, who will investigate the complaint and advise the committee on whether “probable cause” exists that the mediator has violated the Standards of Conduct.³³⁹ The Florida Disciplinary Rules define an investigator as a “certified mediator, or attorney, or other qualified individual”³⁴⁰ The complaint committee may also have one of its unpaid members investigate the allegations if the issues are less complex or required less time consuming investigation.³⁴¹ However, in ten cases, the complaint committees have hired an independent investigator.³⁴² After reviewing the additional information in the investigation report, the complaint committee can find that no probable cause exists to suggest a violation of the Standards of Conduct.³⁴³ It may then dismiss the complaint and notify the complainant and mediator of its decision in writing.³⁴⁴

At any time in this process, the complaint committee may meet with the complainant and the mediator to attempt an informal resolution of the

³³⁷ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.810(g).

³³⁸ *Id.* R. 10.810(h).

³³⁹ *Id.* R. 10.810(i).

³⁴⁰ *Id.* R. 10.720(g).

³⁴¹ Telephone Interview with Sharon Press, *supra* note 74; *see also* FLA. DISCIPLINE RULES, *supra* note 251, R. 10.810(i).

³⁴² *See* Summary of Florida DRC Formal Complaints, *supra* note 89, at Appendix C to this article. Complaint committee members are more likely to hire an investigator if they anticipate the need to interview witnesses. Telephone Interview with Sharon Press, *supra* note 74.

³⁴³ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.810(k). The Supreme Court revised the rules to add the probable cause step after the Florida DRC’s experience with the fourth complaint filed against a mediator. Shortly into the disciplinary process against a well-known mediator, the Florida DRC realized that no credible evidence existed to support the allegations of the complaint. Even so, under the then-existing rules, the complaining party could more easily get a hearing, and the confidentiality provisions did not sufficiently protect the name of the mediator if the process did not result in a sanction. This case raised concerns about the due process rights of accused mediators that informed the views and recommendations of the Standing Committee on ADR Rules. Telephone Interview with Sharon Press, *supra* note 74.

³⁴⁴ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.810(l).

matter.³⁴⁵ This meeting provides the parties an opportunity to exchange additional information and lets the complaint committee and the mediator better understand why the complainant has filed the complaint. It also offers the mediator a chance to give an apology and agree to sanctions that may improve the mediator's skills or lead him or her to use better practices in the future.³⁴⁶ The complaint committees highly recommend these informal meetings because they may resolve the matter without having to resort to a costly, time consuming hearing that imposes a higher burden of proof on the complainant. In addition, the meetings may provide the complainant with the outcome he or she seeks, which is often an admission by the accused mediator that "he gets it."³⁴⁷ Also, at any time in the process, the complaint committee may dismiss a complaint at the request of the complaining party, if it believes dismissal appropriate.³⁴⁸

If the complaint committee finds that a mediator has likely violated a provision of the Florida Standards of Conduct, the complaint committee may draft formal charges and forward them to the DRC. The DRC will then assemble a hearing panel.³⁴⁹ However, the complaint committee can also decide not to refer the case to a hearing panel when the violation may be *de minimis* or a technical violation of the ethics rules. The complaint committee will then file with the DRC a statement of the reason for its decision. The DRC will notify the complainant and mediator in writing of that decision.³⁵⁰ This portion of the process again illustrates that several steps exist to protect mediators against frivolous claims or claims based on conduct involving less serious or technical violations of the Florida Standards of Conduct.

v. Hearing Panel Functions: Resolution of Formal Charges, Adjudicatory Hearings, Imposition of Sanctions, and Rehearing

If the complaint committee believes that the allegations of the complaint deserve a full adjudicatory hearing, it will refer to a hearing panel the formal

³⁴⁵ Unlike the other states analyzed in this article, the complaint committee can require the parties to attend the meeting.

³⁴⁶ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.810(h) & (j).

³⁴⁷ Telephone Interview with Sharon Press, *supra* note 89.

³⁴⁸ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.810(o). The hearing panel may also dismiss a complaint on the motion of the complainant or mediator. *Id.* R. 10.820(c).

³⁴⁹ *Id.* R. 10.810(m), 10.820(a).

³⁵⁰ *Id.* R. 10.810(h), (l); see also Telephone Interview with Sharon Press, *supra* note 89.

charges in a short and plain statement with references to the particular sections of the Florida Standards of Conduct that its investigation indicates the mediator violated.³⁵¹ Unlike any other state analyzed in this article, the complaint committee also asks the DRC to appoint a member of the Florida Bar to prosecute the complaints involving more complex or important issues.³⁵²

The DRC assembles the hearing panel from members of the MQB who have not served on the complaint committee handling that particular complaint.³⁵³ The hearing panel schedules a hearing within 90 days from the date of the notice assigning the matter to the panel.³⁵⁴ It conducts the hearing informally. It applies, but liberally construes, the rules of evidence. Parties may give testimony by telephone if they show good cause for this approach. A mediator has the right to defend against all charges and to be represented by an attorney.³⁵⁵ The DRC will produce, upon written request of a mediator or his or her counsel, the names and addresses of witnesses, copies of written statements, and transcripts of testimony.³⁵⁶ The mediator or his or her counsel must supply the same information to the DRC upon request.³⁵⁷ The Florida Disciplinary Rules grant the chair of any complaint committee or hearing panel the right to subpoena the appearance of witnesses and the production of documentary evidence.³⁵⁸

³⁵¹ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.810(n).

³⁵² *Id.* The DRC Director believes that a mediation party who is not a lawyer would have a difficult time adequately presenting a case against a mediator. An appointed prosecutor ensures that the complaining party has adequate voice in the formal hearing process. Telephone Interview with Sharon Press, *supra* note 74.

³⁵³ *Id.* R. 10.820(a). A party may move to remove a hearing panel member if that member, or that member's relative, is a party to the pending case or has an interest in the case's outcome. A party can also move to remove a panel member if he or she is related to an attorney or counselor of record in the case or is a material witness to the case. The chair of the committee or panel determines the legal sufficiency of the motion to disqualify. A panel member may also recuse him or herself. The DRC will then assign a MQB member to take the place of the disqualified or recused member. *Id.* R. 10.870(a)-(f). Only Florida and Virginia plan for potential conflicts of interest arising with members of the entities regulating mediators. See discussion *infra* note 442 and accompanying text.

³⁵⁴ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.820(b).

³⁵⁵ *Id.* R. 10.820(d)(1)-(4).

³⁵⁶ *Id.* R. 10.820(f).

³⁵⁷ *Id.* R. 10.820(g).

³⁵⁸ *Id.* R. 10.840(a). Georgia and Minnesota also give the entities regulating mediators the power to subpoena witness testimony and documents. See discussion *infra* notes 566, 590, 673 and accompanying text.

Should a complainant fail to appear at a hearing, the panel may dismiss the complaint for want of prosecution. If a mediator does not appear, the hearing will proceed. In both situations of non-appearance, the complainant or mediator can show good cause for postponing or rescheduling the hearing.³⁵⁹

After a hearing, the hearing panel decides whether clear and convincing evidence supports a finding that the mediator has violated the Standards of Conduct.³⁶⁰ If a majority of the panel finds that the evidence supports a violation, the panel imposes appropriate sanctions.³⁶¹ It reports its decision to the DRC. The mediator may petition for rehearing, for good cause, within ten days of the date of the hearing.³⁶² If the hearing panel finds that the evidence does not indicate a violation and dismisses the case, it must promptly file a copy of the dismissal order with the DRC.³⁶³

vi. Possible Sanctions

The hearing panel may impose one or more of the following sanctions:

- (1) Imposition of the costs of the proceeding.
- (2) Oral admonishment.
- (3) Written reprimand.
- (4) Additional training, which may include the observation of mediations.
- (5) Restriction on types of cases which can be mediated in the future.
- (6) Suspension for a period of up to [one] year.
- (7) Decertification or, if the mediator is not certified, bar from service as a Mediator
- (8) Such other sanctions as agreed to by the mediator and the panel.³⁶⁴

As noted above, the regulators most often required the mediator to get additional training or skills. The DRC Director recently explained that “our philosophy is . . . rehabilitation of the mediator, not retribution. So we try as

³⁵⁹ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.820(h)–(i).

³⁶⁰ *Id.* R. 10.820(m). Florida is one of three states analyzed in this article to establish the standard of proof required to find a violation of the ethical guidelines. It is one of two states to require clear and convincing evidence of the violation. *See* discussion *infra* notes 564, 673–74, 840 and accompanying text.

³⁶¹ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.820(m).

³⁶² *Id.* R. 10.820(j).

³⁶³ *Id.* R. 10.820(l).

³⁶⁴ *Id.* R. 10.830(a).

much as possible to bring the mediator back into the fold.”³⁶⁵ However, Florida is unique in also imposing economic sanctions on mediators.³⁶⁶

The hearing panel will file a written sanctions decision with the DRC. The DRC then mails a copy of the decision to all parties.³⁶⁷ The DRC also notifies the circuit courts of any decertified or suspended mediator, unless otherwise ordered by the Florida Supreme Court.³⁶⁸ The mediator must timely comply with the sanctions imposed. If the mediator fails to comply with the sanctions, the hearing panel convenes another hearing for the purpose of determining the ramifications of the mediator’s non-compliance as soon as the DRC learns about it. If the hearing panel finds that the mediator has willfully failed to comply with the sanctions, the hearing panel will decertify the mediator.³⁶⁹

If the hearing panel suspends or decertifies a mediator, the mediator may seek reinstatement under certain circumstances at least two years after the date of decertification. The DRC refers the petition to a hearing panel for review. The hearing panel controls the fate of the mediator by deciding whether he or she is fit to mediate. If fit, the panel notifies the DRC, and the DRC reinstates the petitioner as a certified mediator. The hearing panel can condition a mediator’s reinstatement on the completion of a certified training course if the mediator has been decertified for more than three years.³⁷⁰

vii. *Florida Supreme Court Function: Appeals*

Under the current Florida Disciplinary Rules, a mediator, whom the hearing panel has sanctioned, has a right of review before the Florida Supreme Court. However, mediators who agree to sanctions have no right of review.³⁷¹ Under the proposed changes to the Florida Disciplinary Rules, the Chief Justice of the Florida Supreme Court will hear the request for review under the Florida Rules of Appellate Procedure.³⁷²

³⁶⁵ Conference Transcript, *supra* note 88, at 25–26.

³⁶⁶ See discussion *supra* notes 111–12 and accompanying text.

³⁶⁷ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.830(d).

³⁶⁸ *Id.* R. 10.830(e).

³⁶⁹ *Id.* R. 10.830(b); see also discussion *supra* note 111 and accompanying text.

³⁷⁰ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.830(g).

³⁷¹ *Id.* R. 10.880(a).

³⁷² *Id.* R. 10.880(b). This rule change reflects the Florida Supreme Court’s concern that it has no original jurisdiction in these types of appeals by statute or by the constitution.

viii. *Confidentiality in the Complaint Process*

As noted above, the Florida confidentiality statute exempts from confidentiality

any mediation communication . . . (4) [o]ffered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding [and] . . . (6) [o]ffered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.³⁷³

Thus, unhappy parties and mediators may disclose communications necessary to prove or defend a grievance.

Until a hearing panel imposes or a mediator accepts sanctions, the disciplinary proceedings are confidential.³⁷⁴ After a panel imposes sanctions or the mediator accepts them, the DRC considers all documentation relating to the complaint public, unless otherwise confidential pursuant to law.³⁷⁵ Even when a mediator is not sanctioned, the DRC makes public information about the complaint and its resolution without disclosing the name of the mediator. When the hearing panel imposes sanctions, the DRC publishes the name of the mediator, along with a short summary of the rule violation, the circumstances of that violation, and any sanctions imposed.³⁷⁶ Because of these public disclosures, the complaints filed against mediators serve a highly educational function.³⁷⁷ They have led, in part, to better mediator training and the revision of the Florida Standards of Conduct and Florida Disciplinary Rules.³⁷⁸

³⁷³ FLA. STAT. ANN. § 44.405(4)(a)(4) & (6) (West Supp. 2005).

³⁷⁴ FLA. DISCIPLINE RULES, *supra* note 251, R. 10.850(a).

³⁷⁵ *Id.*

³⁷⁶ *Id.* R. 10.830(f).

³⁷⁷ The Director of Florida's DRC notes: "[F]or educational purposes, [we] do publish every complaint that is filed officially with the grievance board . . ." Conference Transcript, *supra* note 88, at 12. "I've learned a lot based on the grievances that have come in, and it's helped inform the training that we do." *Id.* at 21. As noted above, the grievance information does not appear on the Florida State Courts' website, but the DRC makes the information available upon request. See discussion *supra* note 89.

³⁷⁸ *Id.*; see also discussion *infra* note 859 and accompanying text.

ix. *Immunity for Persons Handling Complaints*

In a section again showing the increased experience of Florida with mediator complaints, a statute grants absolute immunity to “[a] person serving under s. 44.106 to assist the Supreme Court in performing its disciplinary function . . . while acting within the scope of that person’s appointed function.”³⁷⁹ Unlike Virginia, Florida protects persons handling complaints filed against mediators.³⁸⁰ And, like Maine, it provides a high degree of protection.³⁸¹

C. *Virginia’s System of Regulation*

1. *History of Programs and the Regulatory System*

Virginia’s grievance system is part of a highly structured and well-developed system for regulating mediators who wish to join the Virginia Supreme Court’s roster of certified mediators. One scholar has called it “an elaborate ADR regulatory scheme.”³⁸² Its designers looked to Florida’s more fully developed system as the model. It developed as an outgrowth of the Virginia Supreme Court’s 1989 effort to introduce court-connected ADR in the state and to create a central office for management of the ADR program. The regulatory system has moved from one creating awareness about the use and availability of ADR in the courts to one more focused on quality assurance. It has benefited from consistent and persistent support from the Chief Justice of the Virginia Supreme Court and the widespread participation of judges, court clerks, lawyers, and mediators in its overall design.³⁸³

The effort to build a regulatory infrastructure in Virginia began in June 1986 with the formation of a Joint Committee on Alternative Dispute Resolution (Joint Committee) consisting of members from the Virginia Bar Association and the Virginia State Bar. This group helped develop the first clearinghouse ADR center. That center gathered information about the 50

³⁷⁹ FLA. STAT. ANN. § 44.107(3) (West Supp. 2005).

³⁸⁰ See discussion *infra* note 492 and accompanying text.

³⁸¹ See discussion *infra* notes 766–68 and accompanying text.

³⁸² Laflin, *supra* note 46, at 516.

³⁸³ Telephone Interview with Geetha Ravindra, *supra* note 115. Ms. Ravindra noted that the inclusive design process created “transparency and buy-in” by judges, lawyers, and mediators. *Id.* Many of the applicable rules also seem to draw on the CPR-Georgetown Commission principles. See Laflin, *supra* note 46, at 512–16; CPR-Georgetown Commission, *supra* note 200.

ADR programs existing in the state. It also offered training. A year later, Virginia Supreme Court Chief Justice Carrico appointed a 34 member Commission on the Future of Virginia's Judicial System. The commission recommended in May 1989 that the state create an Office of Alternative Dispute Resolution Services. The Virginia General Assembly funded the office in early 1991 under the supervision of the administrative office of the Virginia Supreme Court. The commission also recommended legislation that would allow courts to refer cases to ADR processes and would define the available processes. In 1993, the Virginia General Assembly passed the recommended legislation after reflecting the concerns of Virginia trial lawyers and the state bar's Family Law Section.³⁸⁴

2. *Barriers of Entry to the Field*

The relatively higher barriers of entry to the field and the relatively higher requirements to stay in the field are hallmarks of the system regulating mediators in Virginia. Only certified mediators may participate in court-connected mediation programs. However, the regulatory structure applies to certified mediators even when a mediator conducts a privately, rather than court, referred mediation.³⁸⁵ That regulatory system imposes on aspiring mediators a more rigorous training and mentoring program when compared to most states. The Director of DRS³⁸⁶ certifies mediators in four designations—General District Court, Juvenile and Domestic Relations District Court, Circuit Court-Civil, and Circuit Court-Family—but only after the mediator has satisfied the requirements for each designation.³⁸⁷ The Guidelines for the Training and Certification of Court-Referred Mediators

³⁸⁴ See Lawrence H. Hoover, *Virginia ADR Joint Committee has a Rich History (Part I)*, VIRGINIA ADR (Summer 2002), available at <http://www.mccammongroup.com/articles/index.asp>; Hahn, *supra* note 127, at 149 (providing the drafting history of Virginia's SOEs).

³⁸⁵ The Complaint Procedures state: "These rules apply to all proceedings involving complaints against certified mediators." Complaint Procedures, *supra* note 128, at 1. The Virginia SOEs state: "The Standards of Ethics and Professional Responsibility apply to all certified mediators." VIRGINIA SOEs, *supra* note 48, § B. Thus, the Virginia regulatory system confers both benefits and burdens on mediators that relate to their status as certified mediators rather than solely as a function of the context in which they mediate—court-referred mediations versus private referrals.

³⁸⁶ DRS is described and defined *supra* note 115 and accompanying text.

³⁸⁷ See generally Training Guidelines for the Training and Certification of Court-Referred Mediators (effective Jan. 1, 2000), <http://www.courts.state.va.us/drs/main.htm> [hereinafter Training Guidelines].

also impose good moral character requirements on mediators seeking certification to join the Virginia Supreme Court's roster of mediators.³⁸⁸

Virginia's regulation of mediators includes several procedures designed to give the Director of DRS early and continuing assessments of the quality of certified mediators. First, to become a certified mediator, the trainee must complete a minimum number of hours of training.³⁸⁹ Trainers must certify that the trainee has completed the approved course.³⁹⁰

Second, unlike any other state regulatory system analyzed in this article, Virginia requires trainees to complete observations³⁹¹ and co-mediations³⁹²

³⁸⁸ The DRS Director may deny certification or recertification if an applicant has been convicted of a felony or a misdemeanor involving moral turpitude or has had a professional license revoked. *Id.* §§ B(5), (H).

³⁸⁹ Mediators seeking the General District Court certification must complete 20 hours of approved training. Mediators seeking the Juvenile and Domestic Relations District Court certification must complete 40 hours of training, including 20 hours of basic mediation training and 20 hours of family mediation training. Mediators seeking the Circuit Court-Civil certification must complete 40 hours of training, including 20 hours of basic mediation training and another 20 hours of advanced training in skills required to handle procedurally complex cases. Mediators seeking the Circuit Court-Family Mediation certification must take 52 hours of approved mediation training, including 20 hours of basic mediation training, 20 hours of family mediation training, and 12 hours of advanced mediation training in family finance and economic issues, including equitable distribution and spousal support. Both domestic certifications require eight hours of additional training in domestic abuse issues. All of the certifications require a four-hour course in Virginia's judicial system. Training Guidelines, *supra* note 387, § C. The applicant must complete Form ADR-1000A, <http://www.courts.state.va.us/drs/forms/home.html>.

The Office of the Executive Secretary of the Virginia Supreme Court also prescribes the curriculum of approved training courses for each mediator designation. The Training Guidelines are intended to "ensure that court-referred mediators also meet a high standard of competence and ethical responsibility." Training Guidelines, *supra* note 387, at Statement of Intent. Certified trainers must provide the training under pre-approved curricula. See Guidelines for the Certification of Mediation Training Programs (effective Jan. 1, 2000), http://www.courts.state.va.us/drs/forms/guidelines_training_program.html. Trainers seeking approval of training programs must submit the Application for Mediation Course Certification, Form ADR-2000, <http://www.courts.state.va.us/drs/forms/home.html>.

³⁹⁰ See Trainee Evaluation Form, Form ADR-1006, <http://www.courts.state.va.us/drs/forms/home.html>.

³⁹¹ All of the certification designations require the applicant to observe two mediations conducted by certified mentors in cases similar to the ones the mediator expects to handle. Training Guidelines, *supra* note 387, § (D)(1). If a mediator cannot meet the observation requirement, the Training Guidelines substitute an additional eight-hour training requirement in which the applicant observes two mediations, at least one of

with a mentor certified by the DRS as trained and sufficiently experienced to mentor new mediators.³⁹³ Mentors may recommend to the Director of DRS that an applicant should join the roster, receive additional training, or choose another career path.³⁹⁴

Third, the Virginia Supreme Court requires mediators to obtain recertification for each certified designation every two years. Mediators seeking recertification in all designations must complete a minimum of 5 mediations or 15 hours of mediation during the prior two-year period.³⁹⁵ They must also complete an additional eight hours of training related to their designation, including two hours of mediation ethics instruction.³⁹⁶ The Director of DRS may consider party evaluations or any other written communications about the performance of the mediator seeking recertification.³⁹⁷ Persons denied recertification cannot hold themselves out as certified mediators. They cannot mentor applicants and they cannot train

which is a live demonstration conducted by a certified mentor. *Id.* at 3–6; *see also* Verification of Observation Form, Form ADR-1007, <http://www.courts.state.va.us/drs/forms/home.html>.

³⁹² Applicants must complete at least five hours of mediation in a minimum of three completed cases for the General District Court certification, at least ten hours of family mediation in a minimum of five completed family cases for the Juvenile and Domestic Relations certification, at least ten hours of mediation in a minimum of five completed Circuit Court non-family cases, and at least ten hours of family mediation in a minimum of five completed Circuit Court Family cases. Training Guidelines, *supra* note 387, at 3–7; *see also* Mentee Evaluation Form, Form ADR-1001, <http://www.courts.state.va.us/drs/forms/home.html>.

³⁹³ *See* Application for Mentor Status, Form ADR-4000, <http://www.courts.state.va.us/drs/forms/home.html>. Florida and Maine require observations or supervised mediation experience, but not with certified mentors. *See* discussion *supra* note 287 and accompanying text and *infra* note 706 and accompanying text.

³⁹⁴ Training Guidelines, *supra* note 387, at 3–7; *see also* Kathey Foskett & John Settle, *Mentoring Workshop: Mentor Responsibilities*, Virginia Mediation Network Spring Conference (April 3, 2005) (on file with author).

³⁹⁵ Training Guidelines, *supra* note 387, § G; *see also* Application for Mediator Recertification, Form ADR-1003, <http://www.courts.state.va.us/drs/forms/home.html>.

³⁹⁶ Training Guidelines, *supra* note 387, § G; *see also* Application for Mediator Recertification, *supra* note 395.

³⁹⁷ Training Guidelines, *supra* note 387, § G(9).

applicants who seek certified status.³⁹⁸ About 200 rostered mediators do not recertify each year.³⁹⁹

The frequent recertification process also discourages persons only casually interested in mediation from staying on the court's roster. The process requires truly dedicated mediators to show they are "sharpening the saw" on a regular basis by conducting mediations⁴⁰⁰

The Executive Secretary of the Supreme Court (Executive Secretary)⁴⁰¹ may de-certify mediators who engage in conduct that reflects adversely on their impartiality or mediation skills, or prejudices the proper administration of justice.⁴⁰² Certified mediators also have an affirmative duty to advise the Executive Secretary of any felony convictions, convictions involving moral turpitude, or the loss of a professional license.⁴⁰³ The Executive Secretary may also deny certification to an applicant who has any history of these events.⁴⁰⁴

3. *Ethics Code and Advisory Opinions*

Virginia has also developed a code of ethics that imposes mandatory requirements on certified mediators. The requirements consist of the Standard of Ethics (SOEs)⁴⁰⁵ adopted by the Judicial Council of Virginia⁴⁰⁶

³⁹⁸ *Id.* § G(12).

³⁹⁹ Telephone Interview with Geetha Ravindra, *supra* note 115. The number of mediators on the court roster nonetheless remains stable at about 1,000 mediators because about 200 people join it every year. *Id.*

⁴⁰⁰ At a recent training conference held in Virginia by the Virginia Mediation Network, a mediator sitting in the author's work group complained about the recertification requirements. She claimed that even as a practicing attorney with court contacts, she found it difficult to conduct the additional mediations required to recertify.

⁴⁰¹ The Executive Secretary maintains the Virginia Supreme Court's information system about the 319 courts in the state. It accumulates financial and case information. And it provides administrative services, including payment and payroll processing for the courts, magistrates, the Judicial Inquiry, the Review Commission, and the Virginia Criminal Sentencing Commission. Telephone Interview with Geetha Ravindra, *supra* note 115.

⁴⁰² Training Guidelines, *supra* note 387, § H. This section of the guidelines does not specifically reference Virginia's SOEs, *supra* note 48.

⁴⁰³ Training Guidelines, *supra* note 387, § H(2).

⁴⁰⁴ *Id.* § B(6).

⁴⁰⁵ See Virginia SOEs, *supra* note 48. Nancy Welsh has described these ethical provisions as "particularly thoughtful." See Welsh, *Thinning Vision*, *supra* note 97, at 33 n.139.

and four Virginia Supreme Court rules governing the professional conduct of lawyers or lawyer-mediators.⁴⁰⁷ The legislature has passed a number of statutes governing court-referred dispute resolution and mediation programs,⁴⁰⁸ with specific statutes governing the qualification of neutrals,⁴⁰⁹ the standards and duties of neutrals,⁴¹⁰ the effect of a mediated settlement agreement,⁴¹¹ and grounds for vacating settlement agreements.⁴¹²

The Virginia Supreme Court has considered establishing an ethics advisory panel, but has not done so to date. In the past, the DRS's newsletter *Resolutions* in its "Reader's Response" column framed an ethical issue and sought analysis of the issue from certified mediators who read the

⁴⁰⁶ The Judicial Council of Virginia is the policy making body of the court. The Chief Justice of the Virginia Supreme Court chairs it. It includes other judges, lawyers, and state politicians. Telephone Interview with Geetha Ravindra, *supra* note 115; *see also* Hahn, *supra* note 127, at 149 (providing some drafting history and explaining the resolution of the debate about the use of evaluative techniques in mediation).

⁴⁰⁷ VIRGINIA RULES OF PROFESSIONAL CONDUCT RULE 2.1 (advisor), 2.2 (intermediary), 2.3 (evaluation for use by third persons), 2.10 (third-party neutral), 2.11 (mediator) (2005), available at <http://www.vsb.org/profguides/rules.pdf>.

⁴⁰⁸ VA. CODE ANN. §§ 8.01-576.4 to -576.12 (West 2001 & Supp. 2005) & VA. CODE ANN. §§ 8.01-581.21 to -581.26 (West 2001 & Supp. 2005).

⁴⁰⁹ *Id.* § 8.01-576.8 (West Supp. 2005).

⁴¹⁰ *Id.* §§ 8.01-576.9, 8.01-581.24 (West Supp. 2005).

⁴¹¹ *Id.* §§ 8.01-576.11, 8.01-581.25 (West Supp. 2005).

⁴¹² *Id.* §§ 8.01-576.12, 8.01-581.26 (West Supp. 2005). The court may vacate an agreement and any related court order when:

1. The agreement was procured by fraud or duress, or is unconscionable; 2. If property or financial matters in domestic relations cases involving divorce, property, support or the welfare of a child are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information; or 3. There was evident partiality or misconduct by the neutral, prejudicing the rights of any party.

Id. Mediator misconduct includes

failure of the neutral to inform the parties in writing at the commencement of the mediation process that: (i) the neutral does not provide legal advice; (ii) any mediated agreement may affect legal rights of the parties; (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement."

Id. In Virginia, these required disclosures are known as the "four legals." *See* discussion *supra* note 131 and accompanying text. The risk that a party can undo an agreement because of this particular type of so-called mediator misconduct serves as an additional incentive for Virginia certified mediators to know and adhere to Virginia's SOEs.

newsletter.⁴¹³ The Virginia Supreme Court also publishes at its ADR website two legal ethics opinions on the unauthorized practice of law issued by the Standing Committee on Legal Ethics of the Virginia State Bar.⁴¹⁴

4. *Guidelines for Interacting with the Legal World*

i. *Confidentiality in Mediation*

The regulatory infrastructure also provides substantial guidance to mediators as they interact with the legal world. Virginia has statutes governing confidentiality that create an evidentiary privilege with reasonably certain boundaries.⁴¹⁵ The statutes set out clear exemptions to mediation confidentiality.⁴¹⁶ One exception allows disclosure of communications “to the extent necessary for the complainant to prove [mediator] misconduct and the neutral to defend against such complaint.”⁴¹⁷

ii. *Unauthorized Practice of Law Guidelines and Mediator Immunity*

Virginia is one of three states discussed in this article that offers guidance to mediators about the unauthorized practice of law.⁴¹⁸ The Director of DRS researched and wrote the discussion found at the Virginia Supreme Court’s website in consultation with members of the bar and the mediation community.⁴¹⁹ The State Justice Institute provided the grant money used to support her 18 month project.

⁴¹³ Telephone Interview with Geetha Ravindra, *supra* note 115.

⁴¹⁴ See Standing Comm. on Legal Ethics of the Va. State Bar, Op. No. 107 (Aug. 14, 1987) & Op. No. 1368 (Dec. 12, 1990), available at http://www.courts.state.us.va.us/drs/uplappendix_A.html.

⁴¹⁵ VA. CODE ANN. §§ 8.01-576.10, 8.01-581.22 (West Supp. 2005).

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* § 8.01-576.10(vi).

⁴¹⁸ North Carolina has also provided mediators guidance on the unauthorized practice of law. See <http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/UnauthorizedPracticeofLaw.pdf>; see also discussion of Florida’s ethics advisory opinions *supra* notes 312, 315.

⁴¹⁹ See <http://www.courts.state.va.us/drs/upl/preface.html>; see also Cooley, *supra* note 52, at 73–75; Ravindra, *supra* note 52, at 106–07; McCauley, *supra* note 52, *passim*.

Virginia statutes confer on certified mediators a qualified immunity that applies even in the private referral context.⁴²⁰

5. *Public Oversight of Virginia Mediators Through a Complaint System*

i. *Introduction*

The regulatory infrastructure not only gives the Virginia Supreme Court significant control over who enters the profession, but the infrastructure also gives the court significant control through its grievance system over the quality of the services provided by those mediators. It also gives the court the ultimate ability to remove poorly trained,⁴²¹ unskillful, or morally unfit mediators from the roster of certified mediators.⁴²²

ii. *Staff Function: Complaint Intake Process*

DRS encourages mediation parties and participants to submit evaluations of their mediations on the Client Evaluation Form.⁴²³ The party evaluates whether the case was appropriate for mediation, the total number of hours he or she spent in the mediation session, and the number of sessions. The party also evaluates whether the process was helpful, whether it ended in an agreement, whether the party would use mediation again, and whether he or

⁴²⁰ See VA. CODE ANN. § 8.01-581.23 (West Supp. 2005) (“When a mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, or who is trained and serves as a mediator through the statewide mediation program . . . , then that mediator . . . shall be immune from civil liability for, or resulting from any act or omission done or made while engaged in mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.”). See generally discussion of mediator immunity *supra* note 53. Four of the states analyzed confer immunity by statute. One state confers it by court rule. See discussion *supra* notes 317–18 and accompanying text and *infra* notes 533, 650, 733–34 and accompanying text.

⁴²¹ Thus, like Florida, the grievance system is designed to enforce the Training Guidelines, as well as Virginia’s SOEs. See Scope and Purpose of the Complaint Procedures, http://www.courts.state.va.us/drs/grievance_process.html. This article, however, will not discuss complaints relating to the Training Guidelines.

⁴²² See discussion *infra* note 470 and accompanying text.

⁴²³ See Client Evaluation of Mediation and Mediators, <http://www.courts.state.va.us/drs/forms/home.html>; see also Wissler & Rack, *Participant Questionnaires*, *supra* note 42, at 243–53.

she would recommend the mediator to others. The evaluation form also provides a five-point scale ranking system that covers the skills and attributes of the mediator.⁴²⁴ Over the last eight years, DRS has received 25,000 participant evaluations, all of which the Director of DRS or her staff have read.⁴²⁵ The Director of DRS has reported that, overall, the feedback about mediator performance is positive.⁴²⁶

When an evaluation raises a potential ethical issue, the Director of DRS contacts the mediator. At this time, the Director of DRS will initiate a conversation about the lessons the mediator may have learned as a result of the mediation or the evaluation. They may also discuss better practice approaches. That conversation will also lead in one of two directions. First, the Director of DRS may conclude that the matter does not state a claim under the SOEs. Alternatively, the Director of DRS will decide that an ethical breach may have occurred. She will then forward to the dissatisfied participant information about filing a formal complaint.⁴²⁷

DRS accepts complaints only after the parties have completed the mediation.⁴²⁸ According to the Director of DRS, this ensures that the pending complaint cannot influence the ongoing mediation or be used impermissibly to try to change the outcome of mediation.⁴²⁹ Any person with personal

⁴²⁴ Client Evaluation of Mediation and Mediators, *supra* note 423. The skills and attributes that the client may rank include whether

[t]he mediator: 1. explained the process and procedures; 2. provided useful information; 3. was a good listener; 4. allowed me to talk about issues that were important to me; 5. was respectful; 6. helped clarify issues; 7. encouraged us to come up with our own solutions; 8. informed me that I could consult an attorney; 9. was neutral; [and] 10. wrote our agreement clearly and accurately.

Id. The evaluation form then seeks general comments about the process and the mediator. Many of the identified skills and attributes tie to requirements under Virginia's SOEs. *See* discussion *supra* notes 125–34 and accompanying text.

⁴²⁵ DRS Director's Presentation, *supra* note 116, at slide 6.

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.* at slide 2; *see also* Training Guidelines, *supra* note 373, at 1. Florida and Maine have not received complaints mid-mediation, but the state's complaint procedures would not preclude them. Conference Transcript, *supra* note 88, at 34. Georgia's GODR, in contrast, has received complaints filed after the mediation session ended, but before the court approved the mediated settlement agreement. It has also handled e-mail complaints lodged before all mediation sessions ended. *Id.* (Taaffe noted: "They're hot about something that happened in . . . the pre-mediation, or during the mediation process, but they have not followed up with formal written complaints.")

⁴²⁹ Telephone Interview with Geetha Ravindra, *supra* note 115.

knowledge of the mediator's actions or behaviors may file a formal complaint.⁴³⁰ Complaints come from a number of sources: parties, co-mediators, mentors, trainees, or the referring court.⁴³¹ Persons have filed complaints against co-mediators, mentors, trainers, mediators, and mediation organizations.⁴³²

DRS accepts informal complaints by telephone call, letter, or comment on the Client Evaluation Form.⁴³³ Persons making an informal complaint may convert it to a formal complaint by filing a Mediation Complaint Form.⁴³⁴ The form requires the complaining party to certify that "everything contained in this complaint is correct to the best of my knowledge and belief."⁴³⁵ After DRS receives the formal complaint, the Director of DRS sends the complaining person the information about the Complaint Procedures⁴³⁶ and a copy of the SOEs.⁴³⁷

iii. *Staff and MCP Functions: Facial Sufficiency Analysis and Investigation of Formal Complaints*

The Mediator Complaint Panel (MCP) reviews only formal complaints.⁴³⁸ The Complaint Procedures define the MCP as composed of "two members of the Dispute Resolution Services Advisory Council (who are not members of the Mediator Review Committee) and the Director of the

⁴³⁰ Complaint Procedures, *supra* note 128, § 5b.

⁴³¹ DRS Director's Presentation, *supra* note 116, at slide 3; Telephone Interview with Geetha Ravindra, *supra* note 115.

⁴³² DRS Director's Presentation, *supra* note 116, at slide 4.

⁴³³ Complaint Procedures, *supra* note 128, § 5a.

⁴³⁴ DRS Director's Presentation, *supra* note 116, at slide 3. The complaining party uses OE Form ADR 1004. Persons can download the complaint form at <http://www.courts.state.va.us/drs/forms/complaintformadr-1004.pdf>.

⁴³⁵ Office of the Exec. Sec. of the Sup. Ct. of Va., Mediation Complaint Form, OES Form ADR-1004, <http://www.courts.state.va.us/drs/forms/complaintformadr-1004.pdf>.

⁴³⁶ See discussion *supra* note 427. A web search using Google quickly found this website, thus making the grievance process information readily available to the public. The main webpage for the DRS also has a specific tab with a link to the "Grievance Process." See Virginia's Judicial System, Complaint Process, <http://www.courts.state.va.us/drs/main.htm> (last visited Mar. 2, 2006).

⁴³⁷ DRS Director's Presentation, *supra* note 116, at slide 5.

⁴³⁸ *Id.* at slide 7; Complaint Procedures, *supra* note 128, § 5(a).

[DRS]”⁴³⁹ The panel members currently include the Director of DRS and two non-lawyer certified mediators.⁴⁴⁰ The Executive Secretary of the Supreme Court of Virginia appoints the panel members to two-year staggered terms.⁴⁴¹ The Director of DRS and one other member make a quorum of its members for any authorized actions.⁴⁴²

Within 30 days of receipt by the DRS of the complaint, the MCP meets in person or by conference call to determine whether, if the facts alleged are taken as true, they indicate that the mediator has failed to comply with the SOEs.⁴⁴³ The Director of the DRS calls this step in the process the determination of “facial sufficiency.”⁴⁴⁴ If the MCP concludes that the alleged facts could not be considered a violation of the SOEs, it dismisses the complaint.⁴⁴⁵ The Director of DRS conveys this decision in writing to both the complaining party and the mediator.⁴⁴⁶ However, the MCP can also conclude that the mediator, while not in violation of the SOEs, should still obtain additional training or mentorship.⁴⁴⁷ Thus, the early warning system set up in Virginia allows the regulators to intervene early to prevent future harm to mediation parties even when the mediator has not crossed any ethical boundaries. The mediator may simply need coaching on skills, mediation theory, or ethical considerations.

⁴³⁹ Complaint Procedures, *supra* note 128, § 2(a). The Dispute Resolution Services Advisory Council includes judges, court clerks, and mediators. Telephone Interview with Geetha Ravindra, *supra* note 115.

⁴⁴⁰ The membership of the MCP is not posted on the court’s ADR website, but the DRS Director makes it available upon request. Telephone Interview with Geetha Ravindra, *supra* note 115.

⁴⁴¹ Complaint Procedures, *supra* note 128, § 3(b).

⁴⁴² *Id.* § 3(d). The Complaint Procedures provide the make-up of the panel when a member or the Director has a conflict of interest. *Id.* § 3(e).

⁴⁴³ DRS Director’s Presentation, *supra* note 116, at slide 7.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.* at slide 8; Complaint Procedures, *supra* note 128, § 6(b).

⁴⁴⁶ Complaint Procedures, *supra* note 128, § 6(b).

⁴⁴⁷ DRS Director’s Presentation, *supra* note 116, at slide 8. “If a complaint . . . indicates that there is a need for intervention or training, the letter notifying the mediator of the decision not to take formal action on the complaint may also suggest appropriate training and mentorship. An individual consultation with a mentor mediator selected from a list maintained by the Review Committee may be offered as a means of assisting the mediator in improving performance.” Complaint Procedures, *supra* note 128, § 6(b).

If the MCP concludes that the mediator has possibly violated the SOEs, it sends a letter to the mediator with a copy of the complaint.⁴⁴⁸ The complaining person also gets a copy of this letter.⁴⁴⁹ The mediator may respond to the MCP's letter within 20 days.⁴⁵⁰ The complaining person receives a copy of this response. After reviewing the response of the mediator, the MCP may dismiss the complaint.⁴⁵¹ The Director of DRS sends a copy of the dismissal to the mediator and the complaining party.⁴⁵² Accordingly, throughout this process, the complaining party knows how the MCP is handling his or her complaint.

The MCP will begin an investigation of the complaint in two circumstances. First, it will investigate the complaint if the mediator fails to respond to the MCP's letter.⁴⁵³ Second, the MCP will investigate the complaint if the mediator's response to the letter does not adequately address the concerns of the panel.⁴⁵⁴ The process typically moves forward in two ways. As the first step in either process, the Director of DRS, as the "investigative arm of the panel,"⁴⁵⁵ will interview the complainant, the mediator, and any other parties with information about the complaint.⁴⁵⁶ She will also review any pertinent documents.

⁴⁴⁸ Complaint Procedures, *supra* note 128, §§ 5(c), 6(c).

⁴⁴⁹ *Id.* § 6(c).

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*; DRS Director's Presentation, *supra* note 116, at slide 9.

⁴⁵³ Complaint Procedures, *supra* note 128, § 7(a).

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* The MCP considers the results of the Director's investigation in making its decision to refer the matter to the Review Committee. It may also conduct an additional investigation. The Director takes the lead investigatory role because she has the staff and time to do it. The other members of the MPC are employed full-time at ADR provider organizations and work as unpaid volunteers on the MCP. Telephone Interview with Geetha Ravindra, *supra* note 115.

⁴⁵⁶ The Director has authority to interview the co-mediator, another party to the original mediation, and other persons when appropriate, but she cannot compel their participation in the investigation. Complaint Procedures, *supra* note 128, § 7(b). As noted in the discussion *supra* note 358 and *infra* notes 566, 590, 673, other states have given the regulatory bodies subpoena powers.

iv. *MCP and Review Committee Functions: Complaint Resolution Alternatives*

Next, the Director of DRS will report her investigative findings to the other members of the MCP.⁴⁵⁷ The MCP may then decide, as the first process alternative, to facilitate a meeting between the complainant and the mediator.⁴⁵⁸ This meeting may lead to a settlement of the complaint to the satisfaction of the complainant, the mediator, and the MCP. If the meeting does not result in a settlement, however, or if the MCP determines a meeting is not appropriate, the MCP applies the second process alternative and refers the matter to the Mediator Review Committee (Review Committee).⁴⁵⁹

The Complaint Procedures define the Review Committee as composed of “three members of the Dispute Resolution Services Advisory Council (who are not members of the [MCP]) and two certified providers of mediation services.”⁴⁶⁰ The Executive Secretary appoints the members of this committee to two-year staggered terms.⁴⁶¹ A judge, three attorney-mediators, and one non-attorney mediator comprise the current Review Committee.⁴⁶² Four of its members make a quorum.⁴⁶³ They may act based on a simple majority vote.⁴⁶⁴

The Review Committee studies the complaint, the mediator’s response, the MCP’s concerns, and the results of the investigation.⁴⁶⁵ Within 60 days from the time the MCP has referred the matter to the Review Committee, it sets an informal hearing. At that time, the parties may present witness testimony, documents, or other information in support of or in opposition to the complaint.⁴⁶⁶ Legal counsel may appear for any participating person. But, as the Complaint Procedures emphasize: “[T]he focus of the proceeding will

⁴⁵⁷ Complaint Procedures, *supra* note 128, § 7(c).

⁴⁵⁸ *Id.*

⁴⁵⁹ DRS Director’s Presentation, *supra* note 116, at slide 10.

⁴⁶⁰ Complaint Procedures, *supra* note 128, § 2(b).

⁴⁶¹ *Id.* § 4(b). The Executive Secretary recently appointed the author to the Review Committee.

⁴⁶² Telephone Interview with Geetha Ravindra, *supra* note 115.

⁴⁶³ Complaint Procedures, *supra* note 128, § 4d.

⁴⁶⁴ *Id.* The Complaint Procedures allow for alternative appointments when a member has a conflict of interest. The Complaint Procedures do not define a conflict of interest in this context. *Id.* § 4(e).

⁴⁶⁵ *Id.* § 7(e); DRS Director’s Presentation, *supra* note 116, at slide 11.

⁴⁶⁶ Complaint Procedures, *supra* note 128, § 7(e).

be on dialogue with the parties themselves.”⁴⁶⁷ The Complaint Procedures do not establish the burden of proof required to prove a violation of a SOE.

v. Review Committee Function: Imposition of Sanctions

Within 15 days of the close of the informal hearing, the Review Committee shall issue a written decision.⁴⁶⁸ If the Review Committee finds the mediator has breached the SOE or has otherwise engaged in poor practice, it may impose a range of sanctions.⁴⁶⁹ The sanctions include:

[1] sending a formal letter identifying the corrective action necessary; [2] notifying the dispute resolution center, court service unit, or other entity with whom the mediator is affiliated of the complaint and its results; [3] requiring one or more consultations or co-mediations with a “mentor” selected from the list maintained by the Review Committee; [4] requiring some form of group or individual training; or [5] decertifying the mediator.⁴⁷⁰

Unlike the Florida disciplinary system, the Virginia Review Committee has no authority to order the mediator to pay the cost of the mediation, any other damages the complaining person may have suffered, the cost of the complaint process, or the cost of any subsequent mediation. In that sense, its “restorative” powers are limited. The Review Committee advises the mediator of its decision to impose corrective action or sanctions by letter.⁴⁷¹

If the Review Committee decertifies a mediator, the mediator may apply for recertification after two years from the date of the Review Committee’s decision.⁴⁷² If the Director of DRS denies the application for recertification, the mediator may reapply every six months.⁴⁷³ The Complaint Procedures do

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* § 8(a).

⁴⁶⁹ *Id.* § 8(b). The Review Committee exercises great discretion in determining when to impose sanctions. Telephone Interview with Geetha Ravindra, *supra* note 115.

⁴⁷⁰ Complaint Procedures, *supra* note 128, § 8(a). The Training Guidelines also provide that the Virginia Supreme Court may remove a mediator from the list of certified mediators if the mediator engages in conduct that “reflects adversely on his impartiality or on the performance of his duties as a mediator, or is found to have persistently failed to carry out the duties of a mediator, or is found to have engaged in conduct prejudicial to the proper administration of justice” Training Guidelines, *supra* note 387, § H(1).

⁴⁷¹ Complaint Procedures, *supra* note 128, § 9(c).

⁴⁷² *Id.* § 11(a).

⁴⁷³ *Id.* § 11(b).

not indicate what additional information the Director of DRS may consider in her decision to recertify the mediator.⁴⁷⁴

vi. *Executive Secretary Function: Requests for Review or Reconsideration*

If, at any step in this process, the Director of DRS, the MCP, or the Review Committee dismisses the complaint, the complaining person may request a review by the Executive Secretary of the material gathered in the investigation.⁴⁷⁵ The Executive Secretary may uphold the dismissal or reopen the complaint and send it to the next step in the process. The Executive Secretary may also request the Review Committee to reconsider any decision it has made.⁴⁷⁶ The Complaint Procedures provide that the Review Committee's decision on reconsideration is final.⁴⁷⁷

If the Review Committee imposes corrective action or a sanction, the mediator may also request the Executive Secretary to permit reconsideration of the decision and an opportunity to be heard.⁴⁷⁸ The mediator must submit his or her request in writing within 30 days of any notification from the Review Committee of its decision.⁴⁷⁹ The Executive Secretary must respond to the mediator's request within 15 days of his reconsideration of the matter, or in the event the mediator exercises his or her right to be heard at a hearing, within 15 days after the close of the hearing.⁴⁸⁰ The Executive Secretary's decision on any request for reconsideration is final.⁴⁸¹ Unlike Florida, no right to appeal beyond the Review Committee exists in Virginia.⁴⁸²

vii. *Confidentiality in the Complaint Process*

The Virginia grievance process moves forward under statutes and SOEs governing confidentiality. As noted above, Section 801-576.10(vi) creates an

⁴⁷⁴ The Director has not had to face this decision so far. However, she would consider what the mediator has done since de-certification to enhance his or her training, skills, or ethical awareness. Telephone Interview with Geetha Ravindra, *supra* note 115.

⁴⁷⁵ Complaint Procedures, *supra* note 128, § 9(a).

⁴⁷⁶ *Id.* § 9(a)–(b).

⁴⁷⁷ *Id.* § 9(b).

⁴⁷⁸ *Id.* § 9(c).

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.* § 9(d).

⁴⁸² Telephone Interview with Geetha Ravindra, *supra* note 115.

exception to the evidentiary privilege that attaches to mediation communications under Section 801-576.10 for communications necessary to prove or defend a claim of mediator misconduct.⁴⁸³ Section I of the SOE contains similar language and imposes a duty on the mediator to describe the scope of confidentiality and the exceptions to it.⁴⁸⁴ A footnote to the Complaint Procedures states: "At the start of each mediation, the mediator should ensure that the parties and the mediator sign a waiver of confidentiality with respect to any investigation arising out of a complaint against the mediator."⁴⁸⁵ This footnote suggests that, in addition to the mandatory disclosures required under SOE section D, the mediator must also specifically create this waiver.⁴⁸⁶

The public has access to any formal complaint filed with DRS and information about its disposition.⁴⁸⁷ The Director of DRS maintains these records indefinitely.⁴⁸⁸ Any other information disclosed during the investigation by any person remains confidential under Sections 8.01-596.9 through 8.01-596.10 of the Code of Virginia.⁴⁸⁹ The records assembled in

⁴⁸³ VA. CODE ANN. §§ 8.01-576.1 to -581.22 (West Supp. 2005). Other exceptions relating to alleged misconduct in the mediation permit disclosure of mediation communications:

(ii) in a subsequent action between the neutral or dispute resolution program and a party to the dispute resolution proceeding for damages arising out of the dispute resolution proceeding . . . (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in [§] 8.01-576.12 in a proceeding to vacate a mediated agreement.

Id.

⁴⁸⁴ Virginia's SOE, *supra* note 48, § I.

⁴⁸⁵ Complaint Procedures, *supra* note 128, § 7(a), n.1.

⁴⁸⁶ See Virginia's SOE, *supra* note 48, § D(2).

⁴⁸⁷ Complaint Procedures, *supra* note 128, § 10(a). Despite the specific exemption that applies to information about the complaint and its disposition, the Virginia Supreme Court would not release the information to the author. It would authorize only the release of the summary information appearing in Appendix D to this article. E-mail from Geetha Ravindra (Apr. 14, 2005, 12:47 EST), *supra* note 117; see also E-mail from Geetha Ravindra, DRS Dir., Va. Sup. Ct., to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (May 26, 2005, 13:20 EST) (on file with author) (stating that the acting Executive Secretary would not give the author access to mediator complaint files to conduct research and agreeing instead to provide a summary of the files).

⁴⁸⁸ Complaint Procedures, *supra* note 128, § 10(b).

⁴⁸⁹ *Id.* § 10(a).

connection with complaints that do not result in a formal action by the Review Committee remain confidential.⁴⁹⁰ However, the Director of DRS retains the information “until the next opportunity for the mediator to be considered for recertification.”⁴⁹¹

viii. *Immunity for Persons Handling Complaints*

Virginia has no statute or rule that provides immunity for persons handling disciplinary matters.⁴⁹²

D. *Georgia's System of Regulation*

1. *History of Programs and the Regulatory System*

Georgia has also created a well-planned and coordinated system of mediator regulation.⁴⁹³ Georgia, through rules of the Georgia Supreme Court, regulates the training, registration, re-registration, ethical standards, and grievance process for mediators who serve in court-connected cases. It also approves court-connected ADR programs in more than 90 counties in the state that serve an estimated population of eight million people.⁴⁹⁴ It provides the designers and administrators of these programs advice and guidance. The

⁴⁹⁰ *Id.* § 10(b). Florida, in contrast, makes available information about all formal complaints it receives, even if the Complaint Committee or the Hearing Panel does not find an ethics violation. See Appendix C to this article and discussion *supra* note 89. This information serves an educational function simply by showing the types of behaviors and situations that make parties suspicious of the mediator or the process.

⁴⁹¹ Complaint Procedures, *supra* note 128, § 10(b). The Complaint Procedures do not indicate how the records may influence the recertification decision and who may consider them in that decision. The Director has explained that they may serve as a benchmark to determine what additional efforts the mediator has taken to improve his or her training, skills, or ethical awareness. Telephone Interview with Geetha Ravindra, *supra* note 115.

⁴⁹² E-mail from Geetha Ravindra, DRS Dir., Va. Sup. Ct., to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Sept. 29, 2005, 15:01 EST) (on file with author) (confirming author's research).

⁴⁹³ The Virginia system served as a model for the Georgia system's designers. Telephone Interview with Christina Petrig, *supra* note 146.

⁴⁹⁴ See GA. CODE ANN. § 15-23-10 (2005); see also GODR, COURT-CONNECTED ALTERNATIVE DISPUTE RESOLUTION IN GEORGIA 3-8 (2003), available at <http://www.godr.org/pdfs/booklet04-14-04.pdf> [hereinafter GODR SUMMARY]; GA. SUP. CT., ALTERNATIVE DISPUTE RESOLUTION RULES IV (Jan. 27, 1993), available at http://www.godr.org/resolution_rules.html [hereinafter GEORGIA ADR RULES].

system is funded by a filing fee surcharge that the Georgia Court-Connected Alternative Dispute Resolution Act authorized.⁴⁹⁵ The plan allows judges statewide to offer ADR processes to litigants in their courts.

Two entities play the dominant role in mediator regulation. The Georgia Commission on Dispute Resolution makes policy supporting the development of court-connected ADR. The Georgia Supreme Court appoints its members, which by rule includes judges, lawyers, and non-lawyers.⁴⁹⁶ They serve five-year staggered terms and receive no compensation for their services, other than the reimbursement of expenses.⁴⁹⁷

The Georgia Office of Dispute Resolution (GODR) also plays a significant role in the regulation of mediators.

[It] serves as a resource for ADR education and research; provides technical assistance to new and existing court-connected ADR programs; provides training to neutrals in court ADR programs; implements the Commission's policies regarding qualification of neutrals and quality of programs; registers neutrals who serve court programs; and collects statistics from court-connected programs in order to monitor their effectiveness.⁴⁹⁸

The GODR Director serves at the pleasure of the Commission on Dispute Resolution. GODR's activities are funded as a line item in the judicial branch budget.⁴⁹⁹

⁴⁹⁵ GA. CODE ANN. §§ 15-23-7 to -8 (2005).

⁴⁹⁶ GEORGIA ADR RULES, *supra* note 494, at II(A)(1). The Commission consists of the current Chief Justice of the Georgia Supreme Court or the Chief Justice's designee, a judge of the Georgia Court of Appeals, a designee of the President of the State Bar of Georgia, three superior court judges, and two judges to be drawn from the other four classes of trial courts in Georgia. The remaining members of the Commission will be one member from the Georgia General Assembly, four members of the State Bar of Georgia, and three non-lawyer public members.

Id.; see also GODR SUMMARY, *supra* note 494, at 1. Thus, Georgia is the only state analyzed that includes lay persons as part of its public oversight of mediators. The lay persons currently serving on the Commission are a retired court administrator, a retired Veteran's Administration administrator, and a psychiatrist. See Facsimile Transmission from Christina Petrig, Program Dir., GODR, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 28, 2005) (on file with author).

⁴⁹⁷ GEORGIA ADR RULES, *supra* note 494, at II(A)(3).

⁴⁹⁸ GODR SUMMARY, *supra* note 494, at 1.

⁴⁹⁹ GEORGIA ADR RULES, *supra* note 494, at II(A)(4); Telephone Interview with Christina Petrig, *supra* note 146. The GODR uses mediator registration fees authorized by Georgia ADR Rule II(B)(3) for other program activities. Those fees do not provide the primary source of operating funds for GODR. E-mail from Christina Petrig, Program

2. Barriers of Entry to the Field

The Commission on Dispute Resolution views the neutral registration project as essential to ensuring quality mediation and other ADR processes used in Georgia courts.⁵⁰⁰ The GODR registers neutrals for potential service in court-connected programs in five designations: General Mediation, Domestic Relations Mediation, Specialized Domestic Violence Mediation, Arbitration, and Early Neutral Evaluation.⁵⁰¹ Thus, unlike Virginia, Georgia recognizes only three designations of mediators. Only registered neutrals may serve in court-connected mediation programs.⁵⁰² By rule, persons seeking registry must take a training course approved by the GODR.⁵⁰³

Coordinator, GODR, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Aug. 16, 2005, 17:14 EST) (on file with author).

⁵⁰⁰ GODR SUMMARY, *supra* note 494, at 8.

⁵⁰¹ *Id.*; see also GODR, 2006 Neutral Registration Application, at 2, <http://www.godr.org/forms.html> (last visited Mar. 2, 2006); GODR, Training Approval Guidelines, Application Procedures (2005), http://www.godr.org/neutral_training.html (last visited Mar. 2, 2006) [hereinafter Training Approval Guidelines].

⁵⁰² GEORGIA ADR RULES, *supra* note 494, at 4.

⁵⁰³ *Id.* at IV; see also Training Approval Guidelines, *supra* note 487, § II. The Georgia ADR Rules permit a previously trained mediator the opportunity to prove his or her training meets the requirements under the new rule. It also permits reciprocal recognition of training taken by persons out of state. GA. SUP. CT., REQUIREMENTS FOR QUALIFICATION AND TRAINING OF NEUTRALS, APP. B TO THE GEORGIA ADR RULES II (1993), <http://www.godr.org/adrrules.html> [hereinafter GEORGIA ADR RULES APPENDIX B].

The General Mediation designation requires 28 hours of training in an approved course. GEORGIA ADR RULES APPENDIX B, *id.* at 1(A). The course must cover ethics and professionalism. *Id.* at 1(A). Domestic Relations Mediators must show they hold a bachelor's degree from an accredited college or university. *Id.* They must also complete 40 hours of domestic relations training that "substantially meets the standards of the Family Section of the Association for Conflict Resolution." *Id.* This training must include a segment on domestic violence. *Id.* Mediators who intend to handle cases involving allegations of domestic violence must have additional training. They must first be registered as Domestic Relations Mediators. They must then take an additional 14 hours of approved specialized domestic violence training. *Id.* Registrants for the category of specialized domestic violence mediator must also provide a letter of recommendation from a director of a court-connected ADR program who is familiar with the mediator's work as a domestic relations mediator. *Id.* The rules once required all mediators to submit letters of recommendation. The GODR dropped the requirement when it found the letters posed a serious barrier to entry for non-lawyers who did not have previously existing professional relationships with judges, court personnel, or lawyers who could write the letters of recommendation. Telephone Interview with Christina Petrig, *supra* note 146.

The GODR clearly states that neutral registration is not the same as certifying neutrals or licensing them. The office simply maintains a registry of neutrals who have met specified training requirements and passed a moral character screening. The registration does not apply to neutrals taking only private referrals.⁵⁰⁴ Once registered, the neutral contacts the court in which he or she plans to work. That court may impose additional training requirements under its local rules.⁵⁰⁵ Like Virginia, the mediator's registration remains current for two years.⁵⁰⁶

The ADR Rules provide that documents considered in the registration or renewal of registration process cannot be subpoenaed, apparently for use in any subsequent judicial or administrative proceeding.⁵⁰⁷ However, applicants for registration agree to allow the GODR to review the surrounding circumstances when a professional organization has disciplined an applicant, including private reprimands.⁵⁰⁸ Additionally, the GODR conducts criminal background checks on initial applications and renewals of registration.⁵⁰⁹

All applicants for the registry must show good moral character. An applicant must disclose if he or she has (1) been convicted of, pleaded guilty or *nolo contendere* to a violation of law, including DUI offenses; (2) been disciplined by any professional organization; (3) has had his or her professional privileges curtailed; or (4) relinquished a professional privilege or license while under investigation.⁵¹⁰

Like Florida, Virginia and Maine, trainees must satisfy an observation requirement. Unlike these states, General Mediation applicants are encouraged, but not required, to co-mediate with experienced mediators during the early stages of their careers. But the GODR does not require co-

⁵⁰⁴ GODR SUMMARY, *supra* note 494, at 8.

⁵⁰⁵ *Id.* at 9.

⁵⁰⁶ *Id.*; *see also* GEORGIA ADR RULES APPENDIX B, *supra* note 503, at II; GODR, 2005 Reinstatement Application, <http://www.godr.org/forms.html> (last visited Mar. 2, 2006).

⁵⁰⁷ GA. SUP. CT., ETHICAL STANDARDS FOR MEDIATORS, ALTERNATIVE DISPUTE RESOLUTION RULES, CH. 2 OF APPENDIX C TO GEORGIA ADR RULES 40 (1995), http://www.godr.org/resolution_rules.html [hereinafter GEORGIA ETHICS PROCEDURES]. This section of the rules is confusing in the scope of the protection provided.

⁵⁰⁸ *Id.*; *see also* Neutral Registration Application, *supra* note 501, at 5, 8; Reinstatement Application, *supra* note 506, at 8. The application forms require the applicant to permit the GODR to do a criminal background check.

⁵⁰⁹ Neutral Registration Application, *supra* note 501, at 8.

⁵¹⁰ GEORGIA ADR RULES APPENDIX B, *supra* note 503, at IV(A).

mediation as a prerequisite to registration.⁵¹¹ However, applicants seeking the Domestic Relations Mediator category must co-mediate at least two divorce or custody cases.⁵¹²

In addition, the Commission on Dispute Resolution sets standards for continuing mediation education that appear in Appendix B to the ADR Rules.⁵¹³ They require six hours of additional CME during every two-year registration renewal cycle.⁵¹⁴ The rule does not require, however, additional ethics training.⁵¹⁵ The GODR can remove a neutral from the registry if he or she fails to meet the requirement.⁵¹⁶

The rules governing ADR programs encourage administrators of the programs to collect evaluations from parties and attorneys of mediators and the process.⁵¹⁷ Like Virginia and Maine, these evaluations can lead to scrutiny of a mediator's ethical conduct in a grievance proceeding.⁵¹⁸

3. *Ethics Code and Advisory Opinions*

The state also has a well-formed set of Ethical Standards for Neutrals "serving court programs in Georgia."⁵¹⁹ The Georgia Ethical Standards

⁵¹¹ *Id.* at 1(A). Unlike Virginia, Georgia does not have a formal mentor system. General Mediation applicants must observe or co-mediate five general civil mediations with a registered mediator. Applicants may substitute an approved general mediation practicum. *Id.* Domestic relations mediators must observe one mediation of a divorce or custody case. Applicants may substitute an approved domestic relations mediation practicum. *Id.* Approved courses and practicums appear at http://www.godr.org/neutral_training.html (last visited Mar. 2, 2006).

⁵¹² GEORGIA ADR RULES APPENDIX B, *supra* note 503, at 1(A).

⁵¹³ GA. SUP. CT., UNIFORM RULES FOR DISPUTE RESOLUTION PROGRAMS, APP. A TO GEORGIA ADR RULES 5.3 (1993), <http://www.godr.org/resolution-rules.html> [hereinafter GEORGIA ADR RULES APPENDIX A]. This same appendix declares that "neutrals must be competent." *Id.* at 5.4.

⁵¹⁴ GEORGIA ADR RULES APPENDIX B, *supra* note 503, at 16.

⁵¹⁵ See GEORGIA ADR RULES APPENDIX B, *supra* note 503, at 16–17 (requirements do not mention an ethics CME requirement).

⁵¹⁶ GEORGIA ADR RULES APPENDIX B, *supra* note 503, at II.

⁵¹⁷ GEORGIA ADR RULES APPENDIX A, *supra* note 513, § 10.

⁵¹⁸ See discussion *supra* notes 423–26 and accompanying text and *infra* notes 741–42 and accompanying text.

⁵¹⁹ See GEORGIA ETHICAL STANDARDS, *supra* note 48. Leila Taaffe, the GODR Director, recently reinforced the role of ethical guidelines in the disciplinary process. She said: "[Y]our standards are a guidepost for the mediators, and they are also a frame of reference for the consumer. The consumer knows what to expect from the individual [mediator] and from the mediation." See Conference Transcript, *supra* note 88, at 6.

include commentary from the drafters, as well as examples of the ethical dilemmas a mediator may face in the context of each rule.⁵²⁰ The Georgia Ethical Standards make a distinction between conduct which is “settled” and does not lend itself to the exercise of discretion on the part of the mediator and conduct that does require discretion.⁵²¹ The rules governing “settled” conduct appear at Part V and include rules on referrals, fees, competence, advertising, and diligence. Parts I to III govern the core values of party self-determination, confidentiality, and impartiality of the mediator. Part IV deals with issues of fairness of the process and the settlement.⁵²² Applicants for registration must certify on the application form that they have read the Georgia Ethical Standards, understand them, and agree to conduct mediations consistent with them.⁵²³

The Georgia Supreme Court expressly permits the Commission on Dispute Resolution to issue ethics advisory opinions.⁵²⁴ The Commission on Dispute Resolution may also publish the decisions or rulings it or the Committee on Ethics makes in response to complaints against mediators.⁵²⁵

⁵²⁰ GEORGIA ETHICAL STANDARDS, *supra* note 48. Ansley Barton, the former GODR Director, and the then-Chief Justice of the Georgia Supreme Court, drafted the original ethics standards and commentary. The examples found in the standards reflected ethical dilemmas identified by practicing mediators. Telephone Interview with Christina Petrig, *supra* note 146.

⁵²¹ The author has not seen another mandatory or aspirational set of ethics guidelines organized around this conceptual approach.

⁵²² GEORGIA ETHICAL STANDARDS, *supra* note 48, at IV.

⁵²³ 2005 Registration Application, *supra* note 501, at 8. The signature block of the application states: “I further certify that I understand the ethical standards and agree to conduct myself in accordance with these standards.” *Id.*

⁵²⁴ GEORGIA ADR RULES, *supra* note 494, at V. See discussion *infra* notes 577–80 and accompanying text. For instance, Advisory Opinion 5 discusses confidentiality in the context of juvenile court-connected mediations. An inquiry from the program staff prompted the opinion. See Committee on Ethics, GODR, Advisory Op. 5 (Aug. 2004), <http://www.godr.org/pdfs/Advisory%20Opinion%205.pdf>. In contrast, the Committee on Ethics issued Ethics Opinion 2002-1 in response to a complaint lodged against a mediator. See Committee on Ethics, GODR, Advisory Op. 6 (June 14, 2005), http://www.godr.org/ethics_info.html. E-mail from Christina Petrig, Program Coordinator, GODR, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Aug. 10, 2005, 10:25 EST) (on file with author). Telephone Interview with Christina Petrig, *supra* note 146; see also GODR Complaint Summary at Appendix E to this article. The advisory and ethics opinions appear at http://www.godr.org/ethics_info.html.

⁵²⁵ GEORGIA ADR RULES, *supra* note 494, at V.

4. Guidelines for Interacting with the Legal World

i. Confidentiality in Mediation

Georgia does not have a statute governing confidentiality in mediation. Instead, a Supreme Court rule creates a broad “umbrella” of confidentiality, as well as an evidentiary privilege. It deems any statement made during the case intake process or in the mediation “confidential, not subject to disclosure. . . . [It] may not be disclosed by the neutral or program staff, and may not be used as evidence in any subsequent administrative or judicial proceeding.”⁵²⁶ It exempts only a limited number of communications from the protection of the rule,⁵²⁷ including “communications relevant to legal claims or disciplinary complaints brought against a neutral or an ADR program, but only to the extent necessary to protect the neutral or ADR program.”⁵²⁸ A separate rule governs communications between the mediator, program administrators, and the courts.⁵²⁹ In addition, parties may supplement this grant of confidentiality through contract provisions appearing in the agreement to mediate.⁵³⁰

⁵²⁶ GEORGIA ADR RULES, *supra* note 494, at VII.

⁵²⁷ The exemptions are:

(1) the mediated settlement agreement; (2) threats of imminent violence to self or to other persons; (3) communications supporting the mediator’s suspicion of child abuse or danger to the safety of any person; (4) communications relevant to legal claims or disciplinary proceedings brought against a mediator or an ADR program, but only to the extent necessary to protect the neutral or ADR program; (5) communications the mediator must report under any other mandatory reporting obligations; and (6) information necessary to monitor the quality ADR program.”

Id. Arguably, the language of exception (6) opens all the communications to scrutiny if a party makes a complaint against a mediator based on the quality of the process.

⁵²⁸ *Id.* This language suggests that the person making the complaint may not reveal confidential communications. Instead, only the neutral or program administrator can do so in his, her, or its defense. The GODR Program Coordinator, Christina Petrig, agrees that the language of the rule is confusing. She explains that parties are bound by contractually agreed confidentiality provisions, not by the rule. The rule instead binds mediators, program staff, and courts. Telephone Interview with Christina Petrig, *supra* note 146.

⁵²⁹ GEORGIA ADR RULES APPENDIX A, *supra* note 513, § 7. It requires all communications to be in writing, with copies to the parties, and strictly limits the types of communications the neutral can make.

⁵³⁰ Telephone Interview with Christina Petrig, *supra* note 146.

In addition, two of the advisory ethics opinions issued by the Committee on Ethics analyze confidentiality in mediation.⁵³¹

ii. *Unauthorized Practice of Law Guidelines and Mediator Immunity*

The GODR is currently working on a set of guidelines about the unauthorized practice of law.⁵³² Like Virginia and Minnesota, Georgia provides qualified immunity to mediators working in court-annexed or court-referred programs. A person cannot hold a mediator liable for any “statement, action, omission or decision made in the course of any ADR process unless that statement, action, omission, or decision is 1) grossly negligent and made with malice or 2) is in willful disregard of the safety or property of any party to the ADR process.”⁵³³

iii. *ADR Education of Bar*

The Georgia Supreme Court has also taken an unusual step by requiring each member of the State Bar of Georgia to complete a one-time mandatory three-hour CLE program on dispute resolution and ADR processes.⁵³⁴ Lawyers who have studied the subject in law school are exempt from the requirement.⁵³⁵ Trained neutrals are also exempt. The court recommends that legal ethics programs include subjects on ethics in the ADR context.⁵³⁶ In addition, the court also amended the ethical considerations for lawyers imposing a duty to inform clients about “various forms of dispute resolution,” including reasonable alternatives to litigation.⁵³⁷

⁵³¹ See Committee on Ethics, GODR, Advisory Op. 5 (August 2004) & Advisory Op. 6 (June 14, 2005), http://www.godr.org/ethics_info.html.

⁵³² Telephone Interview with Leila Taaffe, Dir., GODR (July 1, 2005).

⁵³³ GEORGIA ADR RULES, *supra* note 494, at VII(C).

⁵³⁴ *Id.* at VIII.

⁵³⁵ This exemption suggests that the Georgia Supreme Court felt the need to teach “old dogs” new tricks. I often tell my ADR survey class students that they have more training in negotiation and mediation than most practicing attorneys, as evidenced by the empirical research in Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 486 T. 4 (2002) (reporting that 96% of surveyed Missouri lawyers had no more than 20 hours of ADR training prior to 1997).

⁵³⁶ GEORGIA ADR RULES, *supra* note 494, at VIII.

⁵³⁷ *Id.*, amending Ethical Consideration 7-5. The Georgia Supreme Court inadvertently removed this provision from the current draft of the Rules and Regulations

5. Public Oversight of Georgia Mediators Through a Complaint System

i. Introduction

The Georgia Supreme Court ADR Rules require courts to establish procedures to monitor the performance of mediators and procedures to remove “incompetent, ineffective, or unethical neutrals from the roster of registered neutrals.”⁵³⁸ In 1999, Georgia developed a complaint process it calls the “Ethics Procedures.”⁵³⁹ The procedures deal with questions about a mediator’s ethical conduct or moral character. The GODR refers complaints dealing with other issues to the Committee on Training and Credentials of the Commission on Dispute Resolution.⁵⁴⁰ That committee handles complaints arising from persons to whom the court has denied registration because of inadequate training or other qualification issues other than moral character issues.⁵⁴¹

ii. Staff Function: Complaint Intake Process

Complaints may arise in a number of ways. Like Virginia, persons can easily find ethics information on the GODR’s website.⁵⁴² But he or she will have difficulty finding the Ethics Procedures and a complaint form on the website.⁵⁴³ Anyone with knowledge of the subject matter of a complaint may

of the State Bar of Georgia when the court eliminated Ethical Considerations from the format of the rules. Telephone Interview with Christina Petrig, *supra* note 146. GODR hopes to have the requirement included in the next version of those rules. *Id.*

⁵³⁸ GEORGIA ADR RULES APPENDIX A, *supra* note 513, § 10.

⁵³⁹ GEORGIA ETHICS PROCEDURES, *supra* note 507, at 32 n.56.

⁵⁴⁰ *Id.* at Introduction.

⁵⁴¹ This article does not discuss complaints relating to a mediator’s qualifications.

⁵⁴² The home page for the GODR website has a dedicated tab for “Rules, Ethics, Statutes.” Georgia Commission on Dispute Resolution, http://www.godr.org/rules_statutes.html (last visited Mar. 2, 2006).

⁵⁴³ When a person clicks on the tab dedicated to ethics, a paragraph headed “Ethics Information” indicates that: “This section contains the ethical standards for mediators serving court programs in Georgia. It also contains the procedures adopted for handling questions regarding a neutral’s fitness as well as advisory opinions and ethics opinion [sic] issued by the Georgia Commission on Dispute Resolution’s Committee on Ethics.” See Georgia Commission on Dispute Resolution: Ethics Information, http://www.godr.org/ethics_info.html (last visited Mar. 2, 2006) (emphasis added). An unhappy mediation party may not understand that his or her complaint relates to a

file one with the GODR.⁵⁴⁴ Persons may file complaints against the court-connected mediation programs; persons conducting, administering or promoting training programs; and mediators.⁵⁴⁵

The Ethics Procedures also require the GODR Director to conduct, on his or her own initiative, an investigation when GODR learns that a mediator has engaged in conduct that reflects on his or her moral character or fitness. Those events include situations when:

- (1) A court has convicted a mediator or the mediator has pled guilty or *nolo contendere* to a violation of law;
- (2) A professional organization has disciplined the mediator;
- (3) A professional organization has curtailed the mediator's professional privileges;
- (4) The mediator has relinquished any professional privilege or license while under investigation; or
- (5) The mediator does not meet competency standards.⁵⁴⁶

The complaint can take any form, but the person filing it must file a signed and written complaint.⁵⁴⁷ A GODR staff member acknowledges the complaint and keeps the complainant informed of its progress throughout the complaint process.⁵⁴⁸ GODR only forwards formal complaints to the neutral,

"neutral's fitness" and he or she may not know that the complaint procedures are identified as the Ethics Procedures on the next webpage. I did not find a complaint form on an otherwise well-designed website.

⁵⁴⁴ GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(B).

⁵⁴⁵ *See id.*

⁵⁴⁶ *Id.* § II(A).

⁵⁴⁷ *Id.* § II(C). Until the person files a formal complaint, the GODR considers the matter a "grievance." *Id.* § II(B). GODR does not give notice to the mediator of an unhappy party's concerns until the party files a formal complaint. *Id.* § II(B)–(C). GODR does not investigate grievances and does not refer them to the Committee on Ethics. *Id.* § II(B). Thus, unlike Virginia, these informal complaints do not enter the process even if the Director feels they have merit. The GODR Director, Taaffe, explained: "I document that . . . [the] person called on such and such a day and this information was sent to them [sic]. Most of those people don't follow up, but I want to be able to establish that we responded to that call in an appropriate period of time." Conference Transcript, *supra* note 88, at 58. Taaffe further explained: "[W]e need something signed . . . [P]eople in the heat of the moment will put anything into an e-mail . . . And also, we want people to take ownership for the complaint because it's . . . a serious matter." *Id.* at 27.

⁵⁴⁸ As the GODR Director explained:

I take the position that in order for the complainant to feel that the process is completed or to know that[,] we as an institution[,] have followed through on the articulated grievance process . . . they have to be notified that the complaint was

training program, or court program accused of misconduct. A mediator or other respondent has 20 days to respond to the complaint.⁵⁴⁹

iii. *Staff Functions: Facial Sufficiency Analysis and Investigation of the Complaint*

Like Virginia, the GODR Director makes a preliminary review of the formal complaint to determine if it is facially sufficient in stating a claim under the applicable rules governing ethics, training, or moral character.⁵⁵⁰ The Ethics Procedures, however, require the GODR Director to report all formal complaints to the Chair of the Committee on Ethics, who may determine independently that the GODR Director should refer a complaint to the Committee on Ethics.⁵⁵¹ This additional step ensures that the Chair keeps abreast of all incoming complaints and that the GODR Director does not exercise his or her discretion in an inappropriate way. To date, the GODR Director has not found any complaint facially insufficient.⁵⁵²

Like Virginia, the GODR Director next conducts an investigation of the complaint. The GODR Director typically has phone conversations with the complainant, the mediator, and any other knowledgeable persons to elicit relevant information.⁵⁵³

iv. *Staff and Committee on Ethics Functions: Complaint Resolution Alternatives*

The Ethics Procedures also expressly grant the GODR Director the discretion to conduct a facilitated meeting between the parties as an attempt to resolve the matter early when the complaint “has arisen primarily from a misunderstanding” or when the GODR Director concludes that “the complaint does not rise to that level of seriousness required for Committee

resolved one way or the other . . . I think it's very important when the complaint is received to acknowledge that formally with a letter and thank the individual for bringing it to the attention of the office, because it's the only way the profession will grow. The complainant needs to feel validated.

Conference Transcript, *supra* note 88, at 49.

⁵⁴⁹ GEORGIA ETHICS PROCEDURES, *supra* note 507, §§ II(C), II(D).

⁵⁵⁰ *Id.* at II (E).

⁵⁵¹ *Id.*

⁵⁵² Telephone Interview with Christina Petrig, *supra* note 146.

⁵⁵³ GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(F).

[on Ethics] review”⁵⁵⁴ As in Florida and Virginia, this process allows the complaining party an opportunity to exchange information with the mediator and be heard. In the past five years, the GODR Director has not used the process, but instead has put all complaints into the formal complaint process.⁵⁵⁵

v. Committee on Ethics Function: Formal Hearing

A mediator against whom a party has filed a complaint may request a hearing before the Committee on Ethics.⁵⁵⁶ The Committee has granted all hearing requests to date.⁵⁵⁷ If the mediator does not request a hearing, the Committee on Ethics may convene a hearing in its discretion.⁵⁵⁸ The respondent to the complaint gets notice of the hearing by letter, along with information that may assist him or her in preparing for the hearing, including a copy of the complaint and a copy of the procedural rules. The respondent may review at GODR’s offices any “relevant written material submitted to the Committee by any person.”⁵⁵⁹ The responding mediator may not see any work product of the GODR Director, his or her staff, or the Committee, or notes of the witness interviews.⁵⁶⁰ The Committee on Ethics will also send copies of relevant documents to the respondent upon request. The respondent has the right to submit additional written material or witness testimony at the hearing.⁵⁶¹

The Committee on Ethics holds private, informal hearings in which the rules of civil procedure or evidence do not apply.⁵⁶² The hearings are

⁵⁵⁴ *Id.* § II(G).

⁵⁵⁵ Telephone Interview with Christina Petrig, *supra* note 146.

⁵⁵⁶ GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(I). The complaining party may not request a hearing. Conference Transcript, *supra* note 88, at 1.

⁵⁵⁷ Telephone Interview with Leila Taaffe, *supra* note 532.

⁵⁵⁸ Telephone Interview with Christina Petrig, *supra* note 146; *see also* Conference Transcript, *supra* note 88, at 31. The Georgia Ethics Procedures do not indicate how soon the Committee on Ethics must set a matter for hearing. *See* GEORGIA ETHICS PROCEDURES, *supra* note 507.

⁵⁵⁹ GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(I). The GODR has its offices in Atlanta, Georgia. *See* <http://www.godr.org/odr.html>.

⁵⁶⁰ Telephone Interview with Christina Petrig, *supra* note 146.

⁵⁶¹ GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(I).

⁵⁶² *Id.* §§ II(J), III(I). The Committee holds hearings in Atlanta or at other locations convenient to the parties. Telephone Interview with Christina Petrig, *supra* note 146.

recorded and the respondent may request a copy of the tape.⁵⁶³ The Ethics Procedures take care to delineate the standard of proof,⁵⁶⁴ the right to counsel, the permissible forms of testimony,⁵⁶⁵ and the right to subpoena and sequester witnesses.⁵⁶⁶ It also permits the Committee to pay the fees and mileage of witnesses.⁵⁶⁷ It allows the Committee to seek contempt of court against witnesses who fail to appear.⁵⁶⁸ The Committee may, however, decide the matter based on the evidence before it even when a witness fails to appear.⁵⁶⁹ Like Florida, it may dismiss the complaint if the complainant fails to appear.⁵⁷⁰

vi. *Committee on Ethics Function: Imposition of Sanctions*

The Committee on Ethics may impose a sanction if it finds that the mediator has violated the Georgia Ethical Standards or violated the good moral character requirement.⁵⁷¹ It may also sanction a mediator who previously has suffered court or professional sanctions for acts or violations that would constitute a violation of the ethical standards or the moral character requirement.⁵⁷²

⁵⁶³ GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(J). Georgia is the only state analyzed in this article that tape records the proceedings, although Minnesota keeps a record in "electronic" format. MINN. CODE OF ETHICS, *supra* note 48, § II(f). According to this section of the procedures, the tape is not considered part of the record. Only the complaint, the response, and all correspondence make up the record under the Georgia Ethics Procedures. GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(J). However, later sections of the procedures suggest the tape is a part of the record. *Id.* § II(N)(2).

⁵⁶⁴ *Id.* § II(J) (preponderance of the evidence).

⁵⁶⁵ *Id.* The Committee will allow telephonic evidence upon good cause shown. *Id.*

⁵⁶⁶ *Id.*

⁵⁶⁷ GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(J).

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.* § II(K)(1).

⁵⁷² *See id.* § II(K)(2). Specifically, the mediator can be sanctioned if (1) a court has convicted a mediator or the mediator has pled guilty or *nolo contendere* to a violation of law; (2) a professional organization has disciplined the mediator; (3) a professional organization has curtailed the mediator's professional privileges; or (4) the mediator has relinquished any professional privilege or license while under investigation so long as the event or behavior would constitute a violation of the Georgia Ethical Standards or reflect bad moral character. *Id.*

Unlike the other states analyzed, the Ethics Procedures in Georgia contemplate two levels of sanctions. The first set of sanctions applies to situations in which the conduct of the mediator involves no moral turpitude, no potentially injurious risk to the public, no gross incompetence, or no repeated complaints. In those circumstances, the Committee on Ethics may require additional training, continuing education, and mentoring by an experienced mediator/mentor. Otherwise, the Committee may remove the mediator from the GODR's registry and thereby prevent him or her from conducting any additional court-connected mediations. The Ethics Procedures identify two additional sanctions: restriction of the types of cases to be mediated in the future and suspension for a specified term.⁵⁷³ If the respondent does not comply with the sanctions, the Committee on Ethics may remove him or her from the registry, without an additional adjudicatory hearing.⁵⁷⁴

The Commission on Dispute Resolution also may impose remedial sanctions earlier in the process.⁵⁷⁵ If the investigation reveals that a mediator may pose a threat of harm to mediation parties or to the public, the GODR may ask the Commission on Dispute Resolution to suspend the mediator until the parties complete the disciplinary proceedings.⁵⁷⁶

A unique feature of the grievance process allows the Georgia Committee on Ethics to resolve the complaint in two ways. First, it may issue a written decision. Second, it may issue an advisory ethics opinion.⁵⁷⁷ As of September 2005, the Committee had issued six advisory opinions and two ethics opinion.⁵⁷⁸ The advisory opinions may arise when a complaint does not result in a sanction, but raises issues the Committee wants to discuss publicly. Ethics opinions relate to conduct giving rise to a specific complaint and can function as a sanction because the committee may, by rule, reveal the name of the mediator in the opinion.⁵⁷⁹ The opinions serve an educational and cautionary role.⁵⁸⁰

⁵⁷³ *Id.* § II(L).

⁵⁷⁴ *Id.* § II(L), n.67. Florida, in contrast, would require an adjudicatory hearing to impose this sanction. *See* discussion *supra* notes 111, 351–63 and accompanying text.

⁵⁷⁵ GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(H).

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.* § II(M).

⁵⁷⁸ The opinions are available at Georgia Commission on Dispute Resolution, Ethics Information, http://www.godr.org/ethics/ethics_info.html (last visited Mar. 2, 2006). The published opinions do not disclose the names of the complainant and mediator.

⁵⁷⁹ Telephone Interview with Christina Petrig, *supra* note 146.

⁵⁸⁰ *See* GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(M).

vii. *Commission on Dispute Resolution Function: Appeals*

Georgia has a more formal appeal process than provided in Virginia's grievance system. If the Committee on Ethics issues a decision adverse to the respondent-mediator, the respondent may appeal the decision to the Commission on Dispute Resolution within 30 days of the date of the decision.⁵⁸¹ A decision of the Commission on Dispute Resolution is final.⁵⁸² It deliberates outside the presence of the Committee on Ethics and the parties on appeal.⁵⁸³

The Commission on Dispute Resolution may resolve the appeal by setting the matter for another private hearing.⁵⁸⁴ However, the Commission on Dispute Resolution typically looks only at the official record, which includes correspondence between the parties and GODR, any evidence considered by the Committee on Ethics, and the recording of the hearing.⁵⁸⁵ It will accept briefs and hear oral arguments if the respondent requests those options.⁵⁸⁶ If it holds a hearing or oral argument, the Ethics Procedures provide that the respondent-mediator will provide an opening statement and argument, either *pro se* or through his or her counsel.⁵⁸⁷ Next, the Commission on Dispute Resolution may hear a statement from the complainant and any additional evidence if he or she shows good cause for expanding the record.⁵⁸⁸ The Commission on Dispute Resolution may also question the members of the Committee on Ethics about the basis for its decision.⁵⁸⁹ The Commission on Dispute Resolution has the same power as the Committee on Ethics to compel the testimony of witnesses, sequester them, pay their fees and expenses, and seek an order of contempt if they fail

⁵⁸¹ *Id.* § II(N)(1). Thus, a complainant who gets an adverse decision may not appeal. The Georgia Ethics Procedures define "respondent" as "[a] neutral, program director or training program director against whom a complaint is lodged . . ." *Id.* § II(I); see also GEORGIA ADR RULES APPENDIX B, *supra* note 503, at V(D) regarding the appeal after the Committee on Ethics removes a neutral from the registry.

⁵⁸² GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(N)(1).

⁵⁸³ *Id.* § II(N)(4)(d).

⁵⁸⁴ *Id.* §§ II(N)(1), III(I).

⁵⁸⁵ *Id.* § II(N)(2).

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.* § II(N)(4)(a).

⁵⁸⁸ *Id.* § II(N)(4)(b).

⁵⁸⁹ *Id.* § II(N)(4)(c).

to appear.⁵⁹⁰ However, the hearing rules do not indicate that the Commission on Dispute Resolution will take that testimony during the review process, unless it constitutes additional evidence, which the complainant may show good cause to offer.⁵⁹¹

Of the grievance systems analyzed in this article, the Georgia system is the only one that specifically sets forth the standard of review on appeal:

The Commission will not substitute its judgment for that of the Committee in regard to the weight of the evidence or facts, but may reverse or modify the original decision upon a finding that *substantial rights* of the appellant have been prejudiced because the Committee's findings, inferences, conclusions or decision are:

- (a) In violation of constitutional or statutory provisions;
- (b) Beyond the authority of the Committee in either substance or procedure;
- (c) Clearly erroneous;
- (d) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted discretion.⁵⁹²

These confusing standards of review fail to indicate when they support great deference to the decisions of the Committee on Ethics and when they circumscribe that committee's power.⁵⁹³ The clearly erroneous standard typically applies to findings of fact and so apparently contradicts the instruction that the Commission on Dispute Resolution "will not substitute its judgment for that of the Committee in regard to the weight of the evidence or facts."⁵⁹⁴ The standards of review also seem to open every case to appeal

⁵⁹⁰ *Id.* § II(N)(2). The Georgia Supreme Court amended the rule to add the subpoena power in May 1999. *Id.* § II(N)(2), n.71.

⁵⁹¹ *Id.* § II(N)(4).

⁵⁹² *Id.* § II(N)(3) (emphasis added). These standards do not indicate when they will apply. One scholar analyzes the standards of review in civil cases in these categories: (1) jury verdicts reviewed for sufficiency of evidence; (2) trial court's findings of fact reviewed for clear error; (3) conclusions of law reviewed *de novo*; (4) discretionary determinations regarding the conduct of the case reviewed for abuse; and (5) errors of law reviewed for harmless error. See generally 19 JAMES WM. MOORE ET AL., *Moore's Federal Practice* ¶¶ 206.02-.08 (3d ed. 2005). The standards of review recognize the allocation of power between and the expertise of the trial and appellate court. I recommend that the Georgia Ethics Procedures make the application of these standards to fact, law, and discretionary decisions more clear.

⁵⁹³ See discussion *supra* notes 554-72 and accompanying text.

⁵⁹⁴ GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(N)(3).

when the Committee on Ethics issues a sanction that affects the mediator's ability to earn a living by conducting court-referred mediations.⁵⁹⁵ That sanction necessarily prejudices the "substantial rights of the appellant."⁵⁹⁶ Thus, the language of the Georgia Ethics Procedures does not clarify when the Commission on Dispute Resolution is likely to reverse or modify the decision of the Committee on Ethics. The language also reserves to the Commission on Dispute Resolution, in the form of ill-defined standards of review, great discretion.

viii. *Confidentiality in the Complaint Process*

The Ethics Procedures also govern the confidentiality that attaches to the complaint process, the identities of the parties, and the documents created in the process.⁵⁹⁷ Part III provides that GODR keeps "mere grievances" confidential.⁵⁹⁸ If the GODR Director, during her Part II(E) review, finds that the complaint does not rise to a level of seriousness under the Georgia Ethical Standards or the moral character requirements, those complaints remain confidential from public disclosure.⁵⁹⁹

However, complaints forwarded to the Committee on Ethics are treated differently. They lose some of the confidentiality surrounding them.⁶⁰⁰ The GODR may reveal publicly the complaint's existence, but cannot disclose the complaint itself or any response to it until after the Committee on Ethics makes its decision.⁶⁰¹ After that decision, GODR treats the complaint, response, and opinion as a matter of public record.⁶⁰² It may publish a

⁵⁹⁵ See Conference Transcript, *supra* note 88, at 32 (Taaffe remarked: "[W]e . . . deregister[], which has a tremendous economic impact on people, and that's why we're so careful about due process concerns.").

⁵⁹⁶ GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(N)(3).

⁵⁹⁷ *Id.* § II(A)–(I).

⁵⁹⁸ *Id.* § III(A). The Georgia Ethics Procedures do not explain the reasons for this limitation and it seems to undercut an interest in educating mediators about the types of complaints parties lodge.

⁵⁹⁹ *Id.* § III(B). Again, the Georgia Ethics Procedures do not explain the reasons for this limitation. Again, it limits the amount of information available to mediators who are concerned about best practices.

⁶⁰⁰ *Id.* § III(C).

⁶⁰¹ *Id.*; see also *id.* § III(F).

⁶⁰² *Id.* § III(F). The Georgia Ethics Procedures do not indicate what level of confidentiality attaches to these documents during the time in which the respondent has an opportunity to request an appeal or in the event a respondent requests an appeal. Ms. Petrig advises that if the Committee on Ethics issues a private reprimand or letter

synopsis of the case in the office's *Symposium* newsletter.⁶⁰³ If the Committee of Ethics suspends a mediator from the court's registry, either before or after a final decision by the Committee on Ethics, or removes the mediator from the registry after a final decision, GODR disseminates this information to program directors throughout the state.⁶⁰⁴ This action ensures that the de-listed mediator does not get any court-referred mediations inconsistent with the sanction.⁶⁰⁵

Other exceptions to confidentiality exist. The Ethics Procedures waive the parties' right to confidentiality of mediation communications "to the extent necessary to allow the complainant to fully present his [or] her case and to allow the neutral to fully respond to the complaint."⁶⁰⁶ The Ethics Procedures intend the waiver to be narrow and to relate "only to information necessary to deal with the complaint."⁶⁰⁷ The procedures also instruct the Commission on Dispute Resolution, the Committee on Ethics, and the GODR to protect the privacy of all parties "to the fullest extent possible commensurate with fairness to the neutral and protection of the public."⁶⁰⁸

In a confusing paragraph, the Ethics Procedures seem to create an evidentiary privilege precluding the disclosure of statements made in the course of the GODR's investigation, or of statements made before the Committee on Ethics or Commission on Dispute Resolution during any private hearing held by these entities.⁶⁰⁹ The procedures also protect from discovery notes and records pertaining to the investigation or hearing of the

advising the mediator of better or best practices, the complainant does not get a copy of the reprimand or letter. He or she only gets a notice of the action taken. Telephone Interview with Christina Petrig, *supra* note 146.

⁶⁰³ GEORGIA ETHICS PROCEDURES, *supra* note 507, § III(F); *see also* Conference Transcript, *supra* note 88, at 21 (Taaffe noted: "[I]f there's action taken, other than the dismissal of the complaint, that information is published and it's circulated to neutrals as well as to [local court] program directors. So that everyone's educated from this particular event.").

⁶⁰⁴ GEORGIA ETHICS PROCEDURES, *supra* note 507, § III(D).

⁶⁰⁵ Telephone Interview with Christina Petrig, *supra* note 146.

⁶⁰⁶ GEORGIA ETHICS PROCEDURES, *supra* note 507, § III(G).

⁶⁰⁷ *Id.*

⁶⁰⁸ *Id.*

⁶⁰⁹ *Id.* § III(I). The confusing portion of the procedures provides that these statements will not be "subject to disclosure." The following clause in this provision suggests that they will be protected only from disclosure or use as evidence in any subsequent administrative or judicial proceeding. *Id.* However, earlier provisions of the rules suggest that these statements have absolute confidentiality because only the complaint, response, and opinion are part of the public record. *Id.* § III(F).

complaint of the members of the Committee on Ethics, the Commission on Dispute Resolution, or the GODR staff, including any tape recording of the proceeding.⁶¹⁰ The mediator or other respondent may have access to the tape recording in certain circumstances.⁶¹¹

ix. *Immunity for Persons Handling Complaints*

Like Minnesota, the Georgia Supreme Court has provided qualified immunity for members of the Committee on Ethics, the Commission on Dispute Resolution, and the GODR staff against civil damages for any "statement, action, omission or decision" made by them during the investigation or hearing of an "ethics matter."⁶¹² Unlike any other state analyzed, the immunity extends also to individuals reporting to or testifying before the Committee, Commission on Dispute Resolution, or the GODR.⁶¹³ However, the immunity does not protect statements, actions, omissions, or decisions that are grossly negligent and made with malice.⁶¹⁴

E. *Minnesota's System of Regulation*

1. *History of Programs and the Regulatory System*

Minnesota, like Florida, is a recognized leader in the development and institutionalization of court-connected ADR programs.⁶¹⁵ The Minnesota legislature authorized in 1984 the first mandatory, court-connected ADR programs.⁶¹⁶ Two metropolitan areas first experimented with ADR. Hennepin County District Court in Minneapolis started with a non-binding arbitration program for civil claims of low value. In 1987, responding to enabling legislation, the court referred cases valued in excess of \$50,000 to mandatory ADR. Ramsey County courts in St. Paul first experimented with family law mediation in 1986 in custody and visitation cases. The program

⁶¹⁰ *Id.* § III(I).

⁶¹¹ Telephone Interview with Christina Petrig, *supra* note 146.

⁶¹² GEORGIA ETHICS PROCEDURES, *supra* note 507, § IV. It is not clear if the use of the words "ethics matter" intends to extend this immunity beyond the investigation and handling of complaints.

⁶¹³ *Id.* This language does not indicate whether it extends to the complainant and the respondent, who have likely testified before these entities.

⁶¹⁴ *Id.*

⁶¹⁵ Welsh, *Thinning Vision*, *supra* note 97, at 33.

⁶¹⁶ See MINN. STAT. ANN. § 484.73(1) (West 2002).

expanded in the same year when the legislature provided clear guidance on when courts could refer cases to ADR.⁶¹⁷

After engaging in a two year process, an ADR Task Force recommended in 1989 statewide legislation to authorize use of ADR in civil cases. The Task Force responded to a request by the Minnesota Supreme Court and the Minnesota State Bar to “explore alternative methods by which the burden of the caseload upon the courts might be eased and the resolution of the legal problems for citizens facilitated.”⁶¹⁸ The legislature adopted statutes implementing a statewide program and required the Minnesota Supreme Court to adopt rules governing the programs. In turn, the court established the ADR Implementation Committee, which submitted its recommendations to the court in 1993. Out of that process, the Minnesota Supreme Court promulgated Practice Rule 114.⁶¹⁹

2. Barriers of Entry to the Field

Minnesota’s Supreme Court has created higher barriers to entry than aspiring mediators face in at least 35 other states.⁶²⁰ It recognizes two types of “facilitative/hybrid neutrals”—civil and family—who are qualified to conduct mediations, mini-trials, med-arb, and other facilitative processes. It also recognizes two types of “adjudicative” neutrals and one type of “evaluative neutral,” which are not discussed in this article in detail.⁶²¹

The Minnesota Supreme Court allows on its roster of qualified neutrals only those persons who complete the training requirements set out by the Minnesota Supreme Court through courses approved by the Education & Organization Development Division of the State Court Administrator’s

⁶¹⁷ See Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401, 409 (2002) [hereinafter McAdoo, *A Report*] (giving a history of ADR in the state); Bobbi McAdoo, *The Minnesota ADR Experience: Exploration to Institutionalization*, 12 HAMLINE J. PUB. L. & POL’Y 65, 72–87 (1991) [hereinafter McAdoo, *The Minnesota ADR Experience*] (giving a more detailed history of the use of ADR in Minnesota); see generally Bobbi McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer’s Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL’Y 376, 376–89 (1997) (providing additional background information about the development of court-connected ADR in Minnesota).

⁶¹⁸ McAdoo, *A Report*, *supra* note 617, at 409 (quoting MINN. SUP. CT., MINN. STATE BAR ASS’N TASK FORCE ON ALT. DISP. RESOL., FINAL REPORT (1990)).

⁶¹⁹ *Id.* at 410.

⁶²⁰ See DIGEST OF STATE-WIDE REQUIREMENTS FOR COURT MEDIATORS, *supra* note 286.

⁶²¹ See MINN. GEN. R. PRAC. 114.02–.13 (amended 2005).

Office.⁶²² Trained mediators may easily find the applications for placement on the roster on the court's website.⁶²³ The state, unlike the four other states analyzed in this article, does not require applicants to observe experienced mediators. Unlike Florida, Virginia, and Maine, it does not require co-mediation experience. Neutrals who satisfy the requirements are then listed by areas of experience on the Minnesota Supreme Court's website roster. Unlike Florida and Virginia, the court does not "certify" mediators or require recertification or requalification after their original placement on the court's roster. Mediators, however, may allow their roster registration to lapse if they fail to pay an annual fee or fail to satisfy continuing education requirements.⁶²⁴

Minnesota requires facilitative/hybrid neutrals to attend 18 hours of ADR-related continuing education every three-year period. All other neutrals must attend nine hours of ADR-related continuing education training in a

⁶²² *Id.* at 114.2, 114.13(a). Thus, like Florida, Virginia, and Georgia—and unlike Maine—Minnesota approves training programs. Applications for approval of training courses, previously approved courses, and continuing education courses are available at Minnesota Judicial Branch, Information for ADR Neutrals, <http://www.courts.state.mn.us/page/?pageID=165&subSite=adr> (last visited Mar. 2, 2006). Persons seeking to join the list of civil facilitative/hybrid neutrals must take 30 hours of training, with 15 hours of that in role-play situations. The training must include ethics and standards of practice pursuant to the Civil Mediation Act, MINN. STAT. ANN. §§ 572.31–.40 (West 2000). *See* MINN. GEN. R. PRAC. 114.13(a) (amended 2005). Persons wanting to join the roster of family law facilitative/hybrid mediators start by getting 40 hours of training. They must also get six hours of certified domestic abuse issues training and two hours of ethics training. *See id.* at 114.13(c) (amended 2005); *see also* MINN. STAT. ANN. § 518.619(4) (West Supp. 2005) (child custody mediation qualifications). Persons may also qualify as "parenting time expeditors" if they satisfy continuing education requirements. *Id.* § 518.1751(2c). A parenting time expeditor helps divorcing parties resolve parenting time disputes that arise under a parenting time court order. Parenting time expeditors are allowed to enforce, interpret, clarify, and address circumstances not specifically addressed in the court order. They may also determine whether a party has violated an existing parenting order. The statute characterizes the parenting time expeditor as a "neutral" authorized to use a med-arb process. They are instructed to first attempt resolutions by facilitating negotiations between the parties. If the negotiations fail, the parenting time expeditor "shall" make a decision resolving the dispute. *Id.* §§ 518.1751(1), (1b). Twelve of the 33 complaints listed on the Minnesota ADR Review Board Complaint Log involved parenting time expeditors. *See* Minnesota ADR Review Board Complaint Log, *supra* note 152.

⁶²³ MN Judicial Branch, Information for ADR Neutrals, <http://www.courts.state.mn.us/page/?pageID=165&subSite=adr> (last visited Mar. 2, 2006).

⁶²⁴ Telephone Interview with Bridget Gernander, *supra* note 152.

three-year period.⁶²⁵ Despite these relatively rigorous requirements for entry to the field and maintenance of roster status, Charles Pou, Jr. would still call this system a low hurdle/low maintenance program.⁶²⁶

The Minnesota Supreme Court does not do a background check or moral character review of applicants. However, the application for placement on the roster requires applicants to disclose if they are licensed professionals. If so, they must disclose if the applicant's license is suspended or has ever been revoked. The applicant must also disclose if a profession has refused him or her membership or practice rights and whether a profession has ever banned, dropped, or expelled the applicant.⁶²⁷ If a profession has revoked an applicant's license, the Minnesota Supreme Court will not allow him or her to join the neutral roster. If a profession has suspended an applicant's license, the neutral cannot conduct ADR processes during the time of the suspension.⁶²⁸

3. Ethics Code and Advisory Opinions

The Minnesota Supreme Court approved a Code of Ethics for neutrals in 1997.⁶²⁹ In 2000, it began enforcing the Minnesota Code of Ethics.⁶³⁰ The code appears at the Appendix to Rule 114 of the Minnesota General Rules of Practice, which a person can easily access at the court's webpage. The introduction to the Minnesota Code of Ethics explains: "In order for ADR to be effective, there must be broad public confidence in the integrity and

⁶²⁵ MINN. GEN. R. PRAC. 114.13(g) (amended 2005); *see also* Sup. Ct. Minn., Order Promulgating Transitional ADR Continuing Education Reporting Requirements and Amendments to General Rules of Practice, Order No. CX-89-18632 (Dec. 19, 2000); MN Judicial Branch, Information for ADR Neutrals, Individual Application Form, § 3, http://www.courts.state.mn.us/documents/adr/individual_application.doc (last visited Mar. 2, 2005). In the past year, about 130 neutrals lost their roster status, while approximately 150 neutrals applied to join the roster. Telephone Interview with Bridget Gernander, *supra* note 152.

⁶²⁶ Pou, *Assuring Excellence*, *supra* note 32, at 325–28.

⁶²⁷ *See, e.g.*, MN Judicial Branch, Information for Neutrals, Individual Application Form, § 2, http://www.courts.state.mn.us/documents/adr/individual_application.doc (last visited Mar. 2, 2006).

⁶²⁸ Telephone Interview with Bridget Gernander, *supra* note 152.

⁶²⁹ *See* McAdoo, *A Report*, *supra* note 617, at 409–10; McAdoo, *The Minnesota ADR Experience*, *supra* note 617, at 72–87; *see also* Duane W. Krohnke, *Minnesota Takes up ADR Ethics Challenge*, 14 ALT. TO HIGH COST OF LITIG. 121, 122 (Nov. 1996).

⁶³⁰ Telephone Interview with Bridget Gernander, *supra* note 152.

fairness of the process.”⁶³¹ The introduction reminds neutrals of their duties to the parties, to the courts, and to the improvement of ADR processes. It instructs mediators to “observe high standards of ethical conduct” and instructs those persons applying the code to construe it to “advance those objectives.”⁶³²

The Minnesota Supreme Court intends the code to guide neutrals, to inform and protect the consumers of ADR services, and to ensure the integrity of the ADR processes.⁶³³ The short code sections are accompanied by longer comments by the Advisory Task Force explaining and illustrating the meaning and purpose of the rule.⁶³⁴ The Introduction to the Code of Ethics expressly states that the “[c]omments are intended as guides to interpretation but the text of each rule is authoritative.”⁶³⁵

The Minnesota Code of Ethics applies to individuals and organizations approved by the ADR Review Board as qualified under Rule 114 to act as neutrals in court-referred cases.⁶³⁶ It also applies to non-rostered neutrals whom the court appoints to handle ADR processes other than mediation or med-arb in court-connected cases.⁶³⁷ Thus, the Code would not apply to non-rostered mediators who mediate cases referred privately rather than through

⁶³¹ MINN. CODE OF ETHICS, *supra* note 48, at Introduction.

⁶³² MINN. CODE OF ETHICS, *supra* note 48, at Introduction.

⁶³³ *Id.*

⁶³⁴ *Id.* The Minnesota Supreme Court Committee, which promulgates and revises the General Rules of Practice for the District Courts, formed the Advisory Task Force. Telephone Interview with Bridget Gernander, *supra* note 152.

⁶³⁵ MINN. CODE OF ETHICS, *supra* note 48, at Introduction.

⁶³⁶ *Id.*

⁶³⁷ MINN. GEN. R. PRAC. 114.05(b) (amended 2005) (“Except when mediation or med-arb is chosen as a dispute resolution process, the court, in its discretion, or upon recommendation of the parties, may appoint a neutral who does not qualify under Rule 114.12 of these Rules, if the appointment is based on legal or other professional training or experience. A neutral so selected shall be deemed to consent to the jurisdiction of the ADR Review Board and compliance with the Code of Ethics set forth in the Appendix to Rule 114.”). The Ethics Enforcement Procedure applies to “complaints against any individual or organization placed on the roster of qualified neutrals pursuant to R. 114.12 or serving as a court appointed neutral pursuant to R. 114.05(b).” MN Judicial Branch, Filing Complaints, Code of Ethics Enforcement Procedure, <http://www.courts.state.mn.us/page/?pageID=164&subSite=adr> (last visited Mar. 2, 2006) [hereinafter Ethics Enforcement Procedure]; *see also id.* at Advisory Comments to Rule I (stating that the procedure applies “whether the services are court ordered or not, and whether the services are or are not pursuant to Minnesota General Rules of Practice.”).

the courts.⁶³⁸ The introduction to the Code advises approved neutrals that they consent to the jurisdiction of the ADR Review Board and agree to comply with the Minnesota Code of Ethics.⁶³⁹ Failure to comply with the Code gives the Minnesota Supreme Court authority to remove the neutral from the roster of neutrals or take other authorized action.⁶⁴⁰

With an apparent eye to possible malpractice claims and the standards of negligence that might support them, the introduction to the Code states: "Violation of a provision of this Code shall not create a cause of action nor shall it create any presumption that a legal duty has been breached. Nothing in this Code should be deemed to establish or augment any substantive legal duty on the part of neutrals."⁶⁴¹ Minnesota is unique in providing this language, which the state hopes will protect mediators from lawsuits based on the Minnesota Code of Ethics.⁶⁴²

Minnesota does not offer neutrals ethics advisory opinions. Members of the ADR Review Board discussed this service recently, but decided that the Board, a volunteer group, does not have the resources to provide the service.⁶⁴³

4. *Guidelines for Interacting with the Legal World*

i. *Confidentiality in Mediation*

The Minnesota Supreme Court has created two rules governing confidentiality in mediation. One creates an evidentiary privilege against the disclosure of statements and documents produced in mediation.⁶⁴⁴ It also protects the notes, records, and recollections of mediators under any

⁶³⁸ E-mail from Bridget Gernander, *supra* note 180.

⁶³⁹ Minnesota Code of Ethics, *supra* note 48, at Introduction.

⁶⁴⁰ *Id.* The introduction to the Ethics Enforcement Procedure emphasizes that inclusion on the court's roster is a "conditional privilege, revocable for cause." Ethics Enforcement Procedure, *supra* note 637, at Introduction.

⁶⁴¹ MINN. CODE OF ETHICS, *supra* note 48, at Introduction.

⁶⁴² Alabama and Arkansas include similar provisions in their mandatory ethics codes for mediators. *See* ALA. CODE OF ETHICS FOR MEDIATORS, *supra* note 48. Mel Rubin believes tort lawyers will by-pass this limitation by proving negligence through expert testimony that refers to generally agreed standards of conduct. *See also* Rubin & McGirney, *supra* note 54 (describing his role as an expert in a mediator malpractice case).

⁶⁴³ Telephone Interview with Bridget Gernander, *supra* note 152.

⁶⁴⁴ *See* MINN. GEN. R. PRAC. 114.08(a)–(b) (amended 2005); *see supra* note 155 and accompanying text.

circumstances, unless (1) the mediator and the parties waive confidentiality of the materials or (2) the disclosure is required by law or other professional codes.⁶⁴⁵ The second rule governs the parties' communications with the mediator and the mediator's communications to the court during and after the mediation.⁶⁴⁶

The legislature has protected mediation communications and documents from disclosure in court if the parties execute an agreement to mediate. It has also made a mediator incompetent to testify in subsequent proceedings, except in three circumstances, including administrative hearings involving professional misconduct.⁶⁴⁷ Although the language is less clear than in the other states analyzed, it indicates that a neutral could defend against a complaint, but it says nothing about when the complaining party may breach confidentiality to support a complaint against a mediator.

⁶⁴⁵ MINN. GEN. R. PRAC. 114.08(e).

⁶⁴⁶ *Id.* R.114.10; see also *supra* note 155 and accompanying text.

⁶⁴⁷ The applicable statute provides:

A person cannot be examined as to any communication or document, including work notes, made or used in the course of or because of mediation pursuant to an agreement to mediate. This does not apply to the parties in the dispute in an application to a court by a party to have a mediated settlement agreement set aside or reformed. A communication or document otherwise not privileged does not become privileged because of this paragraph. This paragraph is not intended to limit the privilege accorded to communications during mediation by the common law.

MINN. STAT. ANN. § 595.02(1)(l) (West 2000). Another section provides:

No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could: (1) constitute a crime; (2) give rise to disqualification proceedings under the rules of professional conduct for attorneys; or (3) constitute professional misconduct.

MINN. STAT. ANN. § 595.02(1a)(1)–(3) (West 2000). This language suggests the mediator could breach confidentiality to the extent needed to defend a grievance complaint filed against him or her.

ii. *Unauthorized Practice of Law Guidelines and Mediator Immunity*

The ADR Review Board has not developed any guidelines for the unauthorized practice of law in the context of mediation.⁶⁴⁸ Only the Lawyers Professional Responsibility Board has issued advisory opinions on the unauthorized practice of law and they do not relate to mediation.⁶⁴⁹

Like Virginia and Georgia, Minnesota has created a qualified immunity for mediators.⁶⁵⁰

5. *Public Oversight of Minnesota Mediators Through a Complaint System*

i. *Introduction*

The complaint process in Minnesota reflects the depth of knowledge found in its mediation community and the state bar. It also reflects the leadership of the Chief Justice of the Minnesota Supreme Court and the dedication of many hours of volunteer time by the system's designers.⁶⁵¹ For instance, a well respected ADR scholar—James Coben, Associate Professor and Director of the Dispute Resolution Institute at the Hamline University School of Law—currently sits on the ADR Review Board and played an

⁶⁴⁸ Telephone Interview with Bridget Gernander, *supra* note 152. MINN. STAT. ANN. § 481.02(1) prohibits anyone but licensed attorneys to “maintain, conduct, or defend [any action in court], except personally as a party thereto in other than a representative capacity, or by word, sign, letter, or advertisement, to hold out as competent or qualified to give legal advice or counsel, or to prepare legal documents” MINN. STAT. ANN. § 481.02(1) (West 2002). The only explicit exemption from the limitation permits agents for condominiums, cooperatives, or townhouses to appear for the corporate entity or association in conciliation court. *Id.* § 481.02(3)(16).

⁶⁴⁹ Opinions of the Lawyers Professional Responsibility Board, <http://www.courts.state.mn.us/lprb/opinions.html> (last visited Mar. 2, 2006).

⁶⁵⁰ The statute provides: “A person presiding at an alternative dispute resolution proceeding is not subject to civil liability for the person’s conduct in presiding over the proceeding, except for injury caused by malice, bad faith, or reckless conduct. This section does not restrict or affect immunity from liability that may be available under other law.” MINN. STAT. ANN. § 604A.32 (West Supp. 2005).

⁶⁵¹ E-mail from Bobbi McAdoo, Professor and Senior Fellow, Dispute Resolution Institute, Hamline University School of Law, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Sept. 16, 2005, 15:41 EST) (on file with author).

active role in the design of the complaint handling procedures.⁶⁵² His colleague, Professor Bobbie McAdoo, also served on the ADR Review Board and joined him in the early design process.⁶⁵³ Professor Nancy Welsh served on the Minnesota ADR Implementation Committee and also served on the ADR Review Board.⁶⁵⁴

ii. *Staff and ADR Review Board Functions: Complaint Intake Process*

Persons who are unhappy after participating in mediation may easily find a complaint form at a dedicated webpage tab called "Filing Complaints."⁶⁵⁵ The webpage explaining the process instructs unhappy parties to mail the signed complaint in writing to an address appearing on the webpage.⁶⁵⁶ The webpage also makes the Minnesota Code of Ethics easily accessible and also provides the membership of the ADR Review Board.⁶⁵⁷ In addition, the webpage makes available the Minnesota Code of Ethics Enforcement Procedure (Enforcement Procedure).⁶⁵⁸ In other words, an unhappy party can easily find all the documents relevant to his or her complaint at one easily

⁶⁵² A.D.R. Review Board 2005, http://www.courts.state.mn.us/documents/adr/review_board_roster.rtf (last visited Mar. 2, 2006).

⁶⁵³ E-mail from Bobbi McAdoo, *supra* note 651.

⁶⁵⁴ Welsh, *Thinning Vision*, *supra* note 97, at 53 nn.220–21.

⁶⁵⁵ MN Judicial Branch, Filing Complaints, <http://www.courts.state.mn.us/page/?pageID=164&subSite=adr> (last visited Mar. 2, 2006).

⁶⁵⁶ *Id.*; see also Ethics Enforcement Procedure, *supra* note 637, R. II(A) (requiring a written and signed complaint). The Ethics Enforcement Procedure also advises that a person may get a complaint form by calling a telephone number or by contacting the ADR Review Board at a designated e-mail address. *Id.* at Advisory Comment to Rule II.

⁶⁵⁷ See MINN. CODE OF ETHICS, *supra* note 48; see also A.D.R. Review Board 2005, *supra* note 652. The currently posted list of members, however, shows persons with expired terms. The Minnesota Supreme Court appoints the ADR Review Board members from the following categories: five district court judges, two individuals with experience in family law, a court ADR program director, an ADR practitioner from greater Minnesota, an ADR practitioner from the Twin Cities, an attorney, a representative of a nonprofit ADR organization, and a representative of a for-profit ADR organization. It has no lay person members. Telephone Interview with Bridget Gernander, *supra* note 152.

⁶⁵⁸ Ethics Enforcement Procedure, *supra* note 637.

accessed web page under a tab identified as: "For Court Users—Alternative Dispute Resolution."⁶⁵⁹

The complaint form requires the name and contact information for the complainant and the neutral.⁶⁶⁰ It asks for the names of parties involved and the date of the "incident." It only requires a general description of the facts that form the basis for the complaint.⁶⁶¹ Finally, the complaint form requires the complainant to certify that "everything contained in the complaint is correct to the best of my knowledge and belief."⁶⁶²

The authors of the Enforcement Procedure have provided a succinct and clearly written set of procedures that cover qualified neutrals on the Minnesota Supreme Court's roster or neutrals serving as court appointed mediators.⁶⁶³ In addition, the Enforcement Procedure applies to complaints under the Minnesota Code of Ethics, but the ADR Review Board may also consider "the full context of the alleged misconduct, including whether the neutral was subject to other applicable codes of ethics"⁶⁶⁴ Thus, in Minnesota, as in Virginia, a mediator may be subject to concurrent, but perhaps inconsistent, rules of professional conduct.

⁶⁵⁹ MN Judicial Branch, Alternative Dispute Resolution, <http://www.courts.state.mn.us/page/?pageID=110&subSite=adr> (last visited Mar. 22, 2006).

⁶⁶⁰ MN Judicial Branch, Alternative Dispute Resolution, Filing Complaints, Complaint Form, http://www.courts.state.mn.us/documents/adr/complaint_form.doc (last visited Mar. 2, 2006).

⁶⁶¹ Ethics Enforcement Procedure, *supra* note 637, R. II(A) (requiring the complaint to "identify the neutral and make a short and plain statement of the conduct forming the basis of the complaint").

⁶⁶² Complaint Form, *supra* note 655.

⁶⁶³ Ethics Enforcement Procedure, *supra* note 637, at Advisory Comment to Rule I (stating that the procedure applies "whether the services are court ordered or not, and whether the services are or are not pursuant to Minnesota General Rules of Practice."); *see also* discussion *supra* note 620 and accompanying text. Rule 114.02(b) of Minnesota General Rules of Practice defines a "neutral" as "an individual or organization who provides an ADR process." The rule defines a "qualified neutral" as "an individual or organization included on the State Court Administrator's roster as provided in R. 114.12." *Id.* Attorneys who practice collaborative law are subject to the Minnesota Rules on Lawyers Professional Responsibility. The Lawyers Professional Responsibility Board hears complaints filed against them. MINN. STAT. ANN. § 114.02(b).

⁶⁶⁴ Ethics Enforcement Procedure, *supra* note 637, at Advisory Comment to Rule I.

iii. ADR Review Board Function: Sufficiency Analysis of Complaint

The procedure requires the ADR Review Board to determine whether the allegations, if true, state a violation of the Minnesota Code of Ethics. If the complaint is insufficient to state a claim, the ADR Review Board must dismiss it and notify in writing both the complainant and the neutral of its ruling.⁶⁶⁵

iv. ADR Review Board Function: Investigation of the Complaint

If the complaint survives this analysis, the ADR Review Board may make a review, begin an investigation, or request additional information needed to make a decision about the appropriate process. The mediator will receive, by certified mail, a copy of the complaint, a list identifying possible violations of the Minnesota Code of Ethics, and a request for a written response. Like Florida, but unlike Virginia, when the mediator fails to respond to the complaint, the ADR Review Board deems the allegations admitted by the mediator.⁶⁶⁶

v. ADR Review Board Function: Complaint Resolution Alternatives

At this stage of the procedure, the ADR Review Board may recommend that the parties attempt to resolve in mediation the issues raised in the complaint. Both parties, however, must consent to the process. The ADR Review Board offered this option once, but the neutral declined to use the process.⁶⁶⁷ If the parties reach an agreement, the ADR Review Board will dismiss the complaint, but may impose any sanction to which the parties agree. If the mediation does not result in an agreement, the ADR Review Board "shall determine whether to proceed further."⁶⁶⁸

⁶⁶⁵ *Id.* R. II(C).

⁶⁶⁶ *Id.* R. II(D) (giving mediator 30 days to respond).

⁶⁶⁷ Telephone Interview with Bridget Gernander, *supra* note 152. A panel of neutrals has offered to conduct these mediations for a flat fee paid by the ADR Review Board from roster registration fees. *Id.*

⁶⁶⁸ Ethics Enforcement Procedure, *supra* note 637, R. II(E). The rule does not indicate what factors the ADR Review Board may consider in making this "going forward" decision.

The next step in the process appears to be a "review and investigation" that leads to an "action" by a panel of the ADR Review Board.⁶⁶⁹ Both the complainant and the mediator receive, by certified mail, notice of the ADR Review Board's action. Only the mediator may request a hearing before a three-member panel of the ADR Review Board to contest proposed findings or sanctions.⁶⁷⁰ The Enforcement Procedures quickly recite the mediator's due process rights afforded him or her at the hearing. They state: "The neutral shall have the right to defend against all charges, to be represented by an attorney, and to examine and cross-examine witnesses."⁶⁷¹ The ADR Review Board may accept any evidence it deems necessary and construes the relevancy of the evidence liberally in favor of admission to the electronic recording of the proceedings. However, the ADR Review Board may only consider previous or concurrent ethical complaints to the extent that they show a pattern of related conduct, "the cumulative effect of which constitutes an ethical violation."⁶⁷² The ADR Review Board may issue subpoenas for the attendance of witnesses, the production of documents, and other evidentiary materials. If the mediator does not request a hearing, the ADR Review Board's decision becomes final.⁶⁷³

vi. *ADR Review Board Function: Imposition of Sanctions*

The ADR Review Board may impose sanctions, but as in Florida, only on clear and convincing evidence of an ethical violation. The ADR Review Board may impose five stated sanctions, but the rule seems to permit other sanctions as well.⁶⁷⁴ The ADR Review Board may:

- (1) Issue a private reprimand;
- (2) Designate the corrective action necessary for the neutral to remain on the roster;

⁶⁶⁹ *Id.* R. II(F). The ADR Review Board may appoint a complaint review panel comprising members of the ADR Review Board. The ADR Review Board's staff may also conduct investigations. *Id.* at Advisory Comment to Rule II. This comment does not indicate if the panel that conducts the review and investigation is the same three-member panel that conducts the hearing.

⁶⁷⁰ *Id.* R. II(F). The mediator must request a hearing within 14 days of his or her receipt of the notice. *Id.*

⁶⁷¹ *Id.*

⁶⁷² *Id.* R. III(B).

⁶⁷³ *Id.* R. II(F).

⁶⁷⁴ *Id.* R. III(A) (the sanctions include, but are not limited to, the five enumerated sanctions).

- (3) Notify the appointing court and any professional licensing authority with which the neutral is affiliated of the complaint and its disposition;
- (4) Publish the neutral's name, a summary of the violation, and any sanctions imposed;⁶⁷⁵
- (5) Remove the neutral from the roster of qualified neutrals, and set conditions for reinstatement.⁶⁷⁶

This portion of the Enforcement Procedure has no advisory comments indicating what factors the ADR Review Board may consider in imposing each sanction. The procedures do not contemplate economic sanctions.

vii. Full ADR Review Board Function: Appeals

Within 14 days after receipt of the panel's decision, the mediator or the complainant may appeal the decision to the full ADR Review Board. The full ADR Review Board conducts a *de novo* review of the record and the appealing party must pay to transcribe that record.⁶⁷⁷ The decision of the full ADR Review Board is final.⁶⁷⁸

viii. Confidentiality in the Complaint Process

As noted above, the state's confidentiality statute makes a neutral incompetent to testify about mediation communications or conduct.⁶⁷⁹ It makes the mediator competent to testify about any statement or conduct that could "constitute professional misconduct."⁶⁸⁰ Accordingly, the accused mediator may offer evidence to defend a grievance, but it is not clear from

⁶⁷⁵ The ADR Review Board has not yet used this sanction. Telephone Interview with Bridget Gernander, *supra* note 152.

⁶⁷⁶ Ethics Enforcement Procedure, *supra* note 637, R. III(A)(5).

⁶⁷⁷ *Id.* R. II(G).

⁶⁷⁸ *Id.* R. II(G).

⁶⁷⁹ MINN. STAT. ANN. § 595.02(subd. 1a)(1)–(3) (West 2000). The statute provides:

No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could: (1) constitute a crime; (2) give rise to disqualification proceedings under the rules of professional conduct for attorneys; or (3) constitute professional misconduct.

Id.

⁶⁸⁰ *Id.*

the statutory language that the complainant or any other participant in the mediation is also competent to provide evidence about misconduct.

The Enforcement Procedure contains two provisions governing confidentiality in the complaint process. The first provision waives any confidentiality that attaches under Rule 114.08(e) to the mediator's notes, records, or recollections.⁶⁸¹ The second rule keeps confidential all files, records, and proceedings of the ADR Review Board. In addition, the rule permits disclosure of these materials at any time in the process between ADR Review Board members. It allows the mediator to review any file maintained by the ADR Review Board, excluding its work product.⁶⁸² The complainant, however, does not have access to these materials. The rule also permits disclosures of the ADR Review Board's files when otherwise required or permitted by rule or statute.⁶⁸³ The mediator may also waive the confidentiality of the materials assembled for the proceeding.⁶⁸⁴ In addition, the Enforcement Procedure creates an absolute evidentiary privilege for communications made in the enforcement process.⁶⁸⁵ The procedures, unlike those in any other state analyzed, provide that no statement made in the disciplinary proceedings can serve as a basis for a civil lawsuit brought against the person making the statement.

If the ADR Review Board imposes a sanction it becomes public, but its files and records otherwise remain confidential.⁶⁸⁶ Unlike Virginia and Georgia, the language of the rule suggests that no one can disclose information about the allegations in the complaint or the mediator's response. Unlike Florida, but like the other states, the procedures seem to preclude any public statements about complaints that do not result in a sanction. However, the ADR Review Board has interpreted the Ethics Enforcement Procedure broadly to allow public disclosure of the sanction imposed on a mediator and the provisions of the Code of Ethics the mediator has violated. The ADR

⁶⁸¹ Ethics Enforcement Procedure, *supra* note 637, R. II(D).

⁶⁸² *Id.* R. IV(A). Work product is apparently defined as the "mental processes or communications of the Board or staff." *Id.* The rule does not define what communications of the Board or staff are protected from disclosure, but it would seem to protect all communications including those with witnesses during the investigation. It raises questions about how useful the right to inspect the ADR Review Board's file may be to the accused mediator.

⁶⁸³ See discussion *supra* notes 155, 644–46 and accompanying text.

⁶⁸⁴ Ethics Enforcement Procedure, *supra* note 637, R. IV(A)(4).

⁶⁸⁵ *Id.* R. V(A).

⁶⁸⁶ *Id.* R. IV(B).

Review Board also authorized the release of the information found in Appendix F to this article.⁶⁸⁷

ix. Immunity for Persons Handling Complaints

Finally, like Georgia, the Enforcement Procedure provides a qualified immunity to ADR Review Board members and staff for their official conduct.⁶⁸⁸

F. Maine's Regulatory System

1. History of Programs and the Regulatory System

In 2005, the Honorable Howard H. Dana, Jr., serving as the Maine Supreme Judicial Court's liaison to its ADR Planning and Implementation Committee and Chair of the Court's Advisory Committee to the Court ADR Service (CADRES), published a history of the use of ADR in Maine.⁶⁸⁹ Maine experimented as early as 1977 with a court-connected mediation pilot project in several district courts handling small claims. The legislature funded the program in 1979 and authorized it in 1980. Today, every district court with a small claims docket refers cases to mediation.⁶⁹⁰

⁶⁸⁷ E-mail from Bridget Gernander, *supra* note 152; *see also* MINN. STAT. ANN. § 13.84 (West 2005) (governing access to records of the judicial branch, not including the records of boards and commissions of the Minnesota Supreme Court), as amended by Minn. Sup. Ct. Order No. 2 (July 1, 2005), *available at* Westlaw MN ORDER 05-02; *see generally* MINN. STAT. ANN. § 13.84 (West 2005) (regarding court services data); MINN. STAT. ANN. § 13.90 (West 2005) (exempting judiciary from the state sunshine statute and making it subject to court orders governing access to records). The court orders governing access to judicial records specifically exempt several boards and commissions, including the Lawyers Professional Responsibility Board. The orders do not expressly exempt the records of the ADR Review Board, even in the July 2005 order, but the list is not exclusive. *See generally* Margaret Westin, *The Minnesota Government Data Practices Act: A Practitioner's Guide and Observations on Access to Government Information*, 22 WM. MITCHELL L. REV. 839 *passim* (1996).

⁶⁸⁸ Ethics Enforcement Procedure, *supra* note 637, R. V(B).

⁶⁸⁹ Howard H. Dana, Jr., *Court-Connected Alternative Dispute Resolution in Maine*, 57 ME. L. REV. 349 (2005).

⁶⁹⁰ *Id.* at 362; *see also* McEwen, *supra* note 75, at 1357–75 (describing divorce mediation in Maine and the high participation in the process by lawyers); Craig McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 243–45, 249–64 (1981) (describing and assessing empirically the small

Also in 1977, Maine experimented with a court sponsored voluntary mediation service for domestic relations cases.⁶⁹¹ On March 17, 1983, the Chief Justice of the Supreme Court, reflecting the positive conclusions of a report he had received a year earlier, ordered attorneys to discuss ADR options with their domestic relations clients.⁶⁹² He also encouraged judges to assess settlement efforts and to recommend mediation when appropriate. In addition, he instructed courts to give scheduling priorities to cases in which parties had attempted to mediate.⁶⁹³ A legislative commission reported in 1984 the need for greater use of ADR in domestic relations cases, but stopped short of recommending a mandatory program.⁶⁹⁴ Nonetheless, the legislature mandated mediation in contested cases involving children.⁶⁹⁵ A 1995 study generally viewed the program effective.⁶⁹⁶ In a later study, the authors concluded that it produced settlements in less than half the time it took to litigate resolutions, with the parties more often agreeing to joint legal custody in mediation.⁶⁹⁷

The next pilot project took place in the superior courts of two counties from 1988 to 1990.⁶⁹⁸ Parties in non-domestic civil cases could opt to use an ADR process not typically offered in a pilot program. Dana describes it as early neutral evaluation with lawyers who had received only three hours of training.⁶⁹⁹ In 1995, the Maine Supreme Court designed another pilot project in four counties in which parties worked with a neutral attorney who explored settlement possibilities with the parties and reported to the court the types of ADR processes that the parties might use successfully to resolve the dispute.⁷⁰⁰ Eventually, the court would issue a case management order outlining the ADR processes that the parties would pursue.⁷⁰¹

claims pilot program). For a summary of the study's findings see Dana, *supra* note 689, at 362.

⁶⁹¹ Dana, *supra* note 689, at 363–64.

⁶⁹² *Id.* at 364.

⁶⁹³ *Id.*

⁶⁹⁴ *Id.*

⁶⁹⁵ *Id.*

⁶⁹⁶ *Id.* at 365.

⁶⁹⁷ *Id.* at 365–67.

⁶⁹⁸ *Id.* at 368.

⁶⁹⁹ *Id.*

⁷⁰⁰ *Id.* at 370–71.

⁷⁰¹ *Id.*

Finally, a divided Supreme Judicial Court adopted Rule 16B of the Maine Rules of Civil Procedure, effective January 1, 2002.⁷⁰² This rule requires all parties who have filed or removed civil actions to a Superior Court to engage in a suitable ADR process.⁷⁰³ The rule exempts nine types of actions from the requirement, including personal injury cases where the damages are estimated to be less than \$30,000, cases involving mortgage foreclosures or other secured transactions, prisoner actions, cases in which parties have already attempted a settlement through an ADR process, and cases in which a court concludes—based on “good cause shown”—that they should be exempted from the requirement.⁷⁰⁴ The program is funded by a dedicated fund.⁷⁰⁵

2. *Barriers of Entry to the Field*

Maine has imposed relatively high barriers to entry on persons seeking to join one of the five rosters of approved mediators. For instance, listing on the Small Claims Roster requires the lowest level of training, but the requirements exceed those of most states.⁷⁰⁶

⁷⁰² *Id.* at 375.

⁷⁰³ ME. R. CIV. P. 16B(a). *See generally* ME. REV. STAT. ANN. tit. 4, § 18-B(1) (West Supp. 2004) (describing the Court Ordered Dispute Resolution Service (CADRES) program); *see also* Maine.gov, Frequently Asked Questions—Superior Court Alternative Dispute Resolution, <http://www.courts.state.me.us/faq/adr.html> (last visited Mar. 2, 2006).

Is this a “mandatory” ADR program? In most types of civil, commercial cases, the parties are required to try some form of ADR. Because Rule 16B exempts many types of cases from that requirement . . . [t]his is more accurately characterized as a “presumptive” ADR program, because there is a presumption that the parties will engage in ADR unless their case is exempt or they are granted a waiver.

Id.

⁷⁰⁴ ME. R. CIV. P. 16B(b), *available at* http://www.courts.state.me.us/rules_forms_fees/rules/MRCivPOnly7-05.htm#RULE16B ALTERNATIVE (last visited Mar. 2, 2006).

⁷⁰⁵ ME. REV. STAT. ANN. tit. 4, § 18-B(7)–(8) (West Supp. 2004).

⁷⁰⁶ DIGEST OF STATE-WIDE REQUIREMENTS FOR COURT MEDIATORS, *supra* note 286, *passim*; *see* STATE OF MAINE JUD. BRANCH, COURT ALTERNATIVE DISPUTE RESOLUTION SERVICE OPERATIONAL RULES (Nov. 26, 1996), *available at* http://www.courts.state.me.us/courtservices/adr/adr_rules.html [hereinafter MAINE OPERATIONAL RULES]. Applicants must complete 20 hours of mediation process training, with the person completing 8 of those hours within two years of applying for the roster. *Id.* at App. B. Applicants must also complete 15 hours of experience as a mediator or co-mediator, although the state does not impose a requirement, like Virginia, of observation

Applicants can download the roster application form from the court's website.⁷⁰⁷ The form asks for the applicant's educational background, employment experience, formal dispute resolution training, other rosters on which the applicant has served, experience as a neutral and the nature of that experience, the district and superior courts in which the applicant is willing to work, whether the neutral will offer pro bono services in two cases per year, the types of cases the mediator seeks as referrals, the names and contact

and co-mediation experience with qualified mentors. *Id.* In addition, the applicant must complete at least three hours of training or experience in consumer or debtor/creditor law. *Id.* Applicants seeking to join the General Civil Litigation Roster must have at least 40 hours of training, with at least 15 of those hours within two years of the date of the application. *Id.* at App. D. He or she must also accrue 20 hours of experience as a mediator or co-mediator and 10 hours of training or experience in general civil law and court procedure. *Id.* Applicants seeking inclusion on the Superior Court Mediation Roster must meet the most rigorous requirements imposed by Maine. The applicant must first be a member of the General Civil Litigation Roster. *Id.* at App. E. In addition, he or she must have at least 100 hours of training or experience consisting of at least 40 hours of mediation training, 20 hours of experience as a mediator or co-mediator, 10 hours of training or experience in general civil law and court procedure, and a half-day orientation and training program offered by the Court Alternative Dispute Resolution Service (CADRES) on mediation and the Superior Court's ADR program. *Id.* Listing on the Domestic Relations Roster requires a person to complete 40 hours of training, with the person completing at least 15 hours of the training within two years of his or her application for inclusion on the roster. *Id.* at App. A. The applicant also needs 20 hours of experience as a mediator or co-mediator. *Id.* Finally, the applicant must complete ten hours of training or experience in domestic relations law and eight hours of training that relates to domestic abuse issues. *Id.* Maine also recognizes a category of mediators not recognized in most other states—the Environmental, Land Use, and Natural Gas Pipeline mediator. *See* ME. REV. STAT. ANN. tit. 5, § 3341 (2002) (establishes the land use mediation program); ME. REV. STAT. ANN. tit. 5, § 3345 (2002) (establishes the natural gas pipeline mediation program); ME. REV. STAT. ANN. tit. 38, § 347-A(4)(E) (2001) (establishes the environmental law violation mediation program). To join the roster for the environmental mediation program, applicants must have 40 hours of mediation training and 20 hours of experience as a mediator, facilitator of multi-party contested issues, or a co-mediator. MAINE OPERATIONAL RULES, *supra*, at App. C. The applicant must also have 20 hours of work experience or training in land use or environmental law. *Id.* The Director of the Office of Court ADR (ADR Director) makes the final determination about the adequacy of the experience or training on the topics. *Id.* If the mediator plans to handle complex multi-party disputes, he or she must have additional training or experience in handling those types of disputes. *Id.* The CADRES orientation and training course are required for all rosters, even though Appendix E only seems to require it for superior court mediators. E-mail from Diane Kenty, *supra* note 172.

⁷⁰⁷ Forms are available at [Maine.gov](http://www.courts.state.me.us/courtservices/adr/become_neutral.html), *Becoming a Neutral*, http://www.courts.state.me.us/courtservices/adr/become_neutral.html (last visited Mar. 2, 2006).

information of two references, a list of the professional organizations to which the applicant belongs, and professional licensing information. All applicants must agree to be available for at least four mediations per year as provided in the ADR Provider Agreement each successful applicant must sign.⁷⁰⁸

The ADR Director screens the applications at least twice a year.⁷⁰⁹ She may recommend to the Court Alternative Dispute Resolution Service Committee (CADRES Committee) a waiver of any requirement for any particular applicant.⁷¹⁰ The ADR Director accepts or rejects applicants based on the criteria set out in the appendices to the Maine Operational Rules.⁷¹¹ The applicant's acceptance on any roster is conditional on the outcome of a criminal background investigation conducted by the Administrative Office of the Courts.⁷¹² The applicant starts this process by completing a separate form entitled "Background Investigation Information." The form indicates that the review will include inquiry into any criminal or motor vehicle arrest records, conviction records, or other regulatory agency records.⁷¹³ Unlike the other states analyzed, this abbreviated moral character review does not consider disciplinary or other actions taken by regulators of the applicant's profession of origin.

Maine has no formal certification process, but instead maintains a roster of mediators who have satisfied the specified training requirements imposed by the Maine Supreme Judicial Court.⁷¹⁴ It does not require periodic re-registration on the roster, but it does impose substantial continuing education

⁷⁰⁸ *Id.*

⁷⁰⁹ MAINE OPERATIONAL RULES, *supra* note 706, at II(1)(A).

⁷¹⁰ *Id.* at II(1)(B). The CADRES Committee consists of the Chief Justice of the Supreme Judicial Court or a designee, the Chief Justice of the Superior Court or a designee, the Chief Judge of the District Court or a designee, and the state court administrator or a designee. ME. REV. STAT. ANN. tit. 4, § 18-B(6) (Supp. 2005). The ADR Director did not return the author's request for additional information about the role of the CADRES Committee, its membership, and its lay members.

⁷¹¹ MAINE OPERATIONAL RULES, *supra* note 706, at Apps. (A–G); *see also* ME. REV. STAT. ANN. tit 4, § 18-B(6) (discussing who is on the CADRES Committee). If the ADR Director rejects an application to join a roster, the applicant may appeal the decision to the CADRES Committee. Maine Operational Rules, *supra* note 706, at II(3)(C).

⁷¹² MAINE OPERATIONAL RULES, *supra* note 706, at (II)(1)(B) and App. B.

⁷¹³ See discussion *supra* note 707 about the availability of the roster application form.

⁷¹⁴ The Judicial Branch does not approve training programs. See E-mail from Diane Kenty, *supra* note 172.

requirements on all rostered mediators.⁷¹⁵ Small Claims mediators must complete eight hours of continuing education every year.⁷¹⁶ Superior Court, General Civil Litigation, Domestic Relations, and Land Use mediators must accrue 15 hours of continuing education training every year.⁷¹⁷ The training should include mediation process training, substantive law or court procedure in the area of practice, and standards of ethical conduct. Like Florida and Virginia, and unlike Georgia, the rules impose minimum hours of ethics training each year.

3. *Ethics Code and Advisory Opinions*

“[J]udicially-rostered ADR [n]eutrals” must comply with the CADRES Code of Conduct,⁷¹⁸ the Maine Operational Rules, and all other rules, policies, and procedures of the courts, including protocols for domestic abuse screening and for creating safe environments for mediation parties.⁷¹⁹ The rules also require rostered mediators to comply with “any other professional code that governs the activities of the neutral.”⁷²⁰ As noted above, the rules do not require specific training in ethics for inclusion on the roster, but the two training programs available in Maine dedicate some time to the topic.⁷²¹

Maine does not issue ethics advisory opinions directed to mediators.

4. *Guidelines for Interacting with the Legal World*

i. *Confidentiality in Mediation*

Rule 16B of the Maine Rules of Civil Procedure, governing ADR in Superior Courts, sets out the scope of confidentiality in mediation in those

⁷¹⁵ MAINE OPERATIONAL RULES, *supra* note 706, at II(2)(D).

⁷¹⁶ *Id.* at App. B(B).

⁷¹⁷ *Id.* at Apps. C(C), (D)(B), E(II).

⁷¹⁸ ME. CODE OF CONDUCT, *supra* note 48. The ADR Director has applied the Standards of Professional Conduct developed by the Maine Association of Dispute Resolution Professionals (MADRP). See discussion *supra* notes 172–76 and accompanying text. However, these rules only apply to MADRP members by agreement. See Maine Assn. of Disp. Resol. Professionals, MADRP Info, <http://www.madrp.org/Ethics.html> (last visited Mar. 2, 2006).

⁷¹⁹ MAINE OPERATIONAL RULES, *supra* note 706, at II(2)(A). This language suggests, but does not say, that the Maine Code of Conduct applies to rostered neutrals even when they are conducting privately referred mediations.

⁷²⁰ ME. CODE OF CONDUCT, *supra* note 48, at Canon 4.

⁷²¹ Telephone Interview with Diane Kenty, *supra* note 173.

courts.⁷²² It instructs mediators doing court-connected mediations not to disclose any “conduct, statements, or other information acquired at or in connection with the ADR conference, without the ‘informed written consent’ of the parties.”⁷²³ The court also outlines the following exceptions to confidentiality.⁷²⁴ The mediator may disclose (1) information that is necessary as part of conducting the ADR process or reporting its result to the court; (2) information concerning the abuse or neglect of any protected person; (3) information concerning the intention of one of the parties to commit a crime, or the information necessary to prevent the crime, or to avoid subjecting others to the risk of imminent physical harm; or (4) as required by statute or court order.⁷²⁵ The Code of Conduct covers the scope of confidentiality in two brief paragraphs that lack specificity about the nature of any exemptions from confidentiality.⁷²⁶ Taken together, the rules govern disclosures by the mediator, but not by other participants in the mediation.

Also, Rule 408 of the Maine Rules of Evidence gives a limited evidentiary privilege to “conduct or statements made in compromise negotiations or in mediation.” A party could not introduce these communications into evidence to support or refute any substantive issue in dispute, but they could still introduce them if the communications relate to non-substantive issues.⁷²⁷ Maine does not have a separate statute governing

⁷²² ME. R. CIV. P. 16B(k).

⁷²³ *Id.*

⁷²⁴ *Id.*; see also Maine.gov, FAQ, ADR, <http://www.courts.state.me.us/faq/adr.html> (last visited Mar. 2, 2006) (restating exceptions for public).

⁷²⁵ ME. R. CIV. P. 16B(k); see also Advisory Committee’s Notes, *id.* at 91 (“It is anticipated [that] a disclosure pursuant to court order will be utilized only after the court finds that the need for disclosure substantially outweighs the importance of the state’s policy favoring the protection of confidentiality of settlement discussions.”).

⁷²⁶ ME. CODE OF CONDUCT, *supra* note 48, at Canon 2(B)(6) (“A Neutral shall preserve the confidentiality of conduct and communications of the participants except if disclosure is required by rule or law. Confidentiality may be waived by the consent of all participants.”); *Id.* at Canon 2(B)(7) (“A Neutral shall not disclose or use, for any purpose unrelated to ADR duties, nonpublic information acquired in the capacity as an [sic] Neutral. A Neutral shall abstain from public comment on an ADR process except where confidentiality is waived by the consent of all participants.”).

⁷²⁷ ME. R. EVID. 408; see also Michael T. Bigos, *Maine Considers the Uniform Mediation Act*, 18 ME. BUS. J. 222, 224 (2003).

confidentiality in mediation. In 2003, Maine considered adopting the Uniform Mediation Act, but did not do so.⁷²⁸

Under Rule 16B and Part II of the Maine Operational Rules, mediators must submit on a form provided a written report to the CADRES office or to the court. Rule 16B requires the mediator to report, in the event parties fail to reach settlement, “any agreements of the parties on matters such as stipulations, identification and limitation of issues to be tried, discovery matters and further alternative dispute resolution efforts.”⁷²⁹ The report also must indicate whether the parties failed to reach agreement. If the neutral fails to file the report within the required ten-day period, the rule instructs the parties to make the report.⁷³⁰ The reporting requirements of the Maine Operational Rules are vague and inconsistent with the requirements of Rule 16B. They require a report at the “conclusion of each ADR session” whether it ends in a settlement or not. The report states the outcome of the mediation session “and such other information requested.”⁷³¹

ii. *Unauthorized Practice of Law Guidelines and Mediator Immunity*

Like Georgia and Minnesota, Maine does not offer mediators guidelines on the unauthorized practice of law. The Maine Professional Ethics Commission of the Board of Overseers of the Bar has issued at least two opinions on unauthorized practice of law in the context of mediation: one relating to business structures and the other to conflicts of interest.⁷³²

A statute grants absolute immunity from civil liability to ADR providers under contract with the Judicial Department of Maine to the same extent provided to governmental employees under the Maine Tort Claims Act, so long as the provider acts within the scope of the provider’s or the director’s duties.⁷³³ The Maine Operational Rules give immunity to “ADR providers

⁷²⁸ See Bigos, *supra* note 727, at 222; see also Mediation Act: Bill Tracking, <http://www.nccusl.org/Update/ActSearchResults.aspx> (last visited Mar. 2, 2006).

⁷²⁹ ME. R. CIV. P. 16B(h)(2).

⁷³⁰ *Id.*

⁷³¹ MAINE OPERATIONAL RULES, *supra* note 706, at II(2)(B).

⁷³² Prof’l Ethics Comm’n of the Maine Board of Overseers of the Bar (Me. Prof’l Ethics Comm’n), Prof’l Ethics Op. 149 (1995), available at <http://www.mebareverseers.org/Ethics%20Opinions/Opinion%20149.htm>; Me. Prof’l Ethics Comm’n, Prof’l Ethics Op. 142 (1994), available at <http://www.mebareverseers.org/Ethics%20Opinions/Opinion%20142.htm>.

⁷³³ ME. REV. STAT. ANN. tit. 4, § 18-B.3 (Supp. 2004).

under contract with the Judicial Branch” from liability for actions taken in connection with the Maine Operational Rules.⁷³⁴

5. *Public Oversight of Maine Mediators Through a Complaint System*

i. *Introduction*

The ADR Director acknowledges that Maine has a much more informal system of regulating the quality of services provided by mediators in court-connected programs.⁷³⁵ She believes the informality reflects the state’s lower population, its culture, and its legal culture.⁷³⁶ She notes that the informality may express itself most notably in the grievance context in the amount of discretion the ADR Director has in identifying violations of the Code of Conduct, investigating the claims, and imposing sanctions on the mediator.⁷³⁷

ii. *Staff Function: Complaint Intake Process*

While the website of the Maine Supreme Judicial Court offers consumers of ADR services helpful information about ADR processes, it still does not make easily available information about filing a complaint against a mediator.⁷³⁸ The court recently created active links to the Code of Conduct, the court’s ADR rules, and the ADR referral rules.⁷³⁹ But the website does not have a dedicated tab for complaints against mediators as does Virginia, Georgia, and Minnesota. It does not post on the website copies of a

⁷³⁴ MAINE OPERATIONAL RULES, *supra* note 706, at IV.

⁷³⁵ Conference Transcript, *supra* note 88, at 38.

⁷³⁶ “We have only 1.2 million people in the whole state . . . so things tend to operate with fewer formalities in some circumstances.” *Id.*

⁷³⁷ *Id.* The ADR Director operates pursuant to ME. S. CT. R. 16B, which, based on information available to the author, was drafted before the current ADR Director assumed her position. Conference transcript, *supra* note 88, at 37–38.

⁷³⁸ The ADR Director promises to make the information more accessible at the site. E-mail from Diane Kenty, *supra* note 172.

⁷³⁹ Maine.gov, Court Rules, http://www.courts.state.me.us/courtservices/adr/adr_rules.html (last visited Mar. 2, 2006). At the time the author first contacted the ADR Director in July 2005 these links did not exist.

complaint form or advise to whom a person should make a complaint and how.⁷⁴⁰

Like Virginia, the ADR Director may initiate a review of a mediator based upon feedback she receives on evaluation forms mediators distribute to mediation participants.⁷⁴¹ The Exit Questionnaire assures parties that CADRES wants to know if the mediation was helpful and if each party was treated “fairly and professionally.” It asks eight questions designed to elicit information about the mediator’s conduct and effectiveness. It encourages parties to “comment further on your mediation session or the mediator” by contacting the ADR Director at an indicated phone number or e-mail address.⁷⁴²

The Maine Operational Rules also authorize the ADR Director to initiate review of a mediator based on “the ADR provider’s reports, complaints submitted in accordance with the [Maine] Operational Rules, an observation, or any combination of these sources.”⁷⁴³ The ADR Director may get complaints through the court clerk who has received a complaint about a mediator from the parties participating in a court-ordered mediation in that court. The ADR Director also has received complaints from other sources. In addition, the ADR Director will accept complaints by e-mail, unlike other state programs.⁷⁴⁴ Moreover, the complaint does not need to be in writing, signed, or certified by the complainant as in Florida, Virginia, Georgia, and Minnesota. Thus, in some ways, a party may have an easier time in lodging a complaint in Maine, as long as he or she can obtain contact information for the ADR Director.

⁷⁴⁰ Nonetheless, the ADR Director believes an effective complaint procedure is “accessible and easy to use.” Conference Transcript, *supra* note 88, at 44.

⁷⁴¹ See MAINE OPERATIONAL RULES, *supra* note 706, at II(2)(C).

⁷⁴² Attachment to E-mail from Bethany M. Gagnon, Adm. Secretary for the CADRES Program, Maine Jud. Branch, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (July 27, 2005, 09:27 EST) (on file with author).

⁷⁴³ *Id.* In one situation, she sanctioned a mediator for breach of confidentiality that she observed directly. See discussion *supra* notes 111, 178 and accompanying text. The ADR Director explained: “I have added a personal observation of a mediator following a complaint, because that’s the best way for me to judge what is happening there.” Conference Transcript, *supra* note 88, at 40.

⁷⁴⁴ Conference Transcript, *supra* note 88, at 39 (Kenty stated, “I would accept an e-mail.”).

The ADR Director keeps a log of complaints. She promptly acknowledges each complaint by a letter and expresses regret that the party is unhappy about his or her mediation experience.⁷⁴⁵

iii. *Staff Functions: Facial Sufficiency Analysis and Investigation of Complaints*

The Maine Operational Rules allow the ADR Director to “screen the complaint and . . . discuss the complaint with the ADR provider or other participants in confidence.”⁷⁴⁶ She also determines whether the complaint is frivolous or fails to state a claim under the Code of Conduct.⁷⁴⁷ If she finds the complaint frivolous, she will contact the complaining party by phone to explain the basis for her determination.⁷⁴⁸

The ADR Director’s investigation of claims alleging a violation of the Code of Conduct may include observing the mediator in a mediation session.⁷⁴⁹ This observation gives her information about the mediator’s style,

⁷⁴⁵ *Id.* at 39, 44. The Maine Operational Rules provide: “[The] Director shall respond to the complainant and may inform the complainant about the outcome of the complaint.” Maine Operational Rules, *supra* note 706, at II(3)(A); *see also* E-mail from Diane Kenty, *supra* note 172.

⁷⁴⁶ MAINE OPERATIONAL RULES, *supra* note 706, at II(3)(A).

⁷⁴⁷ Conference Transcript, *supra* note 88, at 39. The Maine Operational Rules provide, without stating a standard for dismissal, the following: “The Director shall then consider all information available and may dismiss the complaint without further action or review the complaint further.” MAINE OPERATIONAL RULES, *supra* note 706, at II(3)(A).

⁷⁴⁸ Conference Transcript, *supra* note 88, at 38–39. Kenty stated:

I act as the human filter I respond immediately by writing a letter . . . or I would write a responsive e-mail to acknowledge that I’ve received the complaint, and I also express that someone has been dissatisfied with their mediation. So I am the determination of whether a complaint is frivolous or whether it has substance. [Discusses the complaint in which a party expected the mediator to represent him/her in court.] And of course, that’s not what a mediator would do So that for me is an example of the kind of complaint in which I would take no further action, except to talk to the party and help them [sic] understand more about mediation.

Id.

⁷⁴⁹ In her other roles as the ADR Director she regularly observes mediators as part of the quality assurance system of the court. Accordingly, she may sit in on the mediation without first explaining that a person has filed a complaint against the mediator. Conference Transcript, *supra* note 88, at 40–42. She tries to observe every rostered mediator every two years. *Id.* at 42.

philosophy, and technique.⁷⁵⁰ It also offers her the opportunity to discuss the observed session and the complaint received. She may then coach the mediator in more skillful approaches in mediation. She always contacts the mediator in writing and in person about a complaint.⁷⁵¹ Maine, therefore, gives more discretion to the program director to identify possible ethics violations and to investigate those claims than any state analyzed, except Virginia.

iv. *Staff Functions: Complaint Resolution Alternatives and Imposition of Sanctions*

Maine uniquely gives its program director the discretion to take actions, make interventions, or impose sanctions without first holding any type of formal evidentiary hearing. Like Virginia, the ADR Director may impose a remedial action—like training or supervised mediation experience—even when she does not find a technical violation of an ethics rule. Under the rule, the ADR Director may impose a sanction—called an action—if she finds merit to the complaint. She suggests the needed action in a letter to the mediator.⁷⁵²

As noted above, sanctions tend to require the accused mediator to observe or work under the supervision of an experienced mediator or to get additional training. The ADR Director has great discretion in imposing sanctions. Her purpose in imposing most sanctions is educative or “restorative.”⁷⁵³ In one situation, however, the ADR Director removed a

⁷⁵⁰ See Conference Transcript, *supra* note 88, at 40. The Maine Operational Rules allow the ADR Director to consider “all pertinent information, including interviews with or written statements from the ADR provider, disputants’ counsel, and court personnel, [as well as] the complaint and other information developed by the ADR Director.” MAINE OPERATIONAL RULES, *supra* note 706, at II(3)(B).

⁷⁵¹ Conference Transcript, *supra* note 88, at 40. The Operational Rules require the ADR Director to “notify the ADR provider of the pending review in writing.” MAINE OPERATIONAL RULES, *supra* note 706, at II(3)(B).

⁷⁵² Conference Transcript, *supra* note 88, at 40–41. The Maine Operational Rules provide: “[T]he Director may terminate the review without action or may notify the ADR provider in writing of any proposed action and the method by which an ADR provider may appeal the decision” MAINE OPERATIONAL RULES, *supra* note 706, at II(3)(B). The rules, however, do not delineate—unlike the other states analyzed—the sanctions, interventions, or actions the ADR Director may impose.

⁷⁵³ Conference Transcript, *supra* note 88, at 42–43.

mediator from the roster,⁷⁵⁴ and in four other situations apparently encouraged their voluntary resignation from the roster.⁷⁵⁵ Under Maine's more flexible process, the ADR Director expects the outcome to "fit the particular case" ⁷⁵⁶

v. CADRES Committee Function: Appeals

If the mediator is not happy with the imposed sanction, the mediator may appeal the ADR Director's action to the CADRES Committee within 14 days from the date of the action letter.⁷⁵⁷ So far, no mediator has filed an appeal.⁷⁵⁸

An unusual feature of the appeal process allows the complaining party and the responding mediator to mediate the dispute.⁷⁵⁹ If the parties do not choose to mediate the complaint or the mediation does not result in an agreement, the CADRES Committee conducts a review of the ADR Director's proposed action. The rule does not indicate the evidence the CADRES Committee may consider or its standard of review. It also does not outline the rights of the mediator in presenting evidence on appeal. The CADRES Committee may affirm, reject, or modify the ADR Director's proposed action or sanction.⁷⁶⁰

⁷⁵⁴ The ADR Director has explained that the situation in which she removed a mediator from the roster does not appear on the Maine CADRES Complaint Log, *supra* note 171, because the ethics complaint did not originate from a party complaint. Instead, she directly observed the behavior. Conference Transcript, *supra* note 88, at 44; E-mail from Diane Kenty, *supra* note 172; *see also* discussion *supra* notes 111, 178 and accompanying text.

⁷⁵⁵ Conference Transcript, *supra* note 88, at 43–44. The Maine Operational Rules also give the ADR Director discretion to remove someone from the roster prior to completion of the investigation of a complaint when "it is in the best interest of CADRES to do so." MAINE OPERATIONAL RULES, *supra* note 706, at II(4). The Maine CADRES Complaint Log indicates that mediators who have withdrawn from the roster have done so voluntarily. *See* Maine CADRES Complaint Log, *supra* note 171.

⁷⁵⁶ Conference Transcript, *supra* note 88, at 46.

⁷⁵⁷ MAINE OPERATIONAL RULES, *supra* note 706, at II(3)(C).

⁷⁵⁸ Telephone Interview with Diane Kenty, *supra* note 173.

⁷⁵⁹ MAINE OPERATIONAL RULES, *supra* note 706, at II(3)(C).

⁷⁶⁰ *Id.*

vi. *Confidentiality in the Complaint Process*

Unlike the four other states analyzed, Maine has no rule or statute exempting mediation communications from confidentiality when they may relate to a claim of professional misconduct. Therefore, a complainant or mediator has no clear authority to breach confidentiality to support or defend against a claim.

In addition, no rule or statute specifically governs confidentiality in the complaint process. One rule, however, permits the ADR Director to discuss the complaint with the mediator and other mediation participants.⁷⁶¹ The mediator may review the complaint and other information “developed by the Director.”⁷⁶² The rule does not make clear whether the mediator has access to the ADR Director’s notes, interview summaries, and other work product. The CADRES Committee must notify the mediator and the ADR Director of any decision it makes on appeal.⁷⁶³ Accordingly, the rules governing the complaint process make it unclear what types of information he or she may access to better understand the complaint. In addition, the information available to the complaining party seems quite limited under these rules. One rule allows the ADR Director to inform the complainant about the resolution of the complaint.⁷⁶⁴

Moreover, the rules do not clearly indicate what information the program director can disclose to the public. The state’s Sunshine Act would support the disclosure of the allegations in the complaints against mediators and the resolution of each complaint while keeping the identity of the mediator confidential.⁷⁶⁵ The state could resolve this uncertainty through more carefully written statutes and rules as a way to enhance the educational function of the complaint process.

⁷⁶¹ *Id.* at II(3)(A).

⁷⁶² *Id.* at II(3)(B).

⁷⁶³ *Id.* at II(3)(C).

⁷⁶⁴ *Id.* at II(3)(A).

⁷⁶⁵ ME. REV. STAT. ANN. tit. 1, §§ 401, 402(2) (1989) (describing purpose of statute and definition of “public meetings”); § 402(3) (Supp. 2005) (defining “public records”); *see also* Letter from Paula M. Young, Assistant Professor of Law, Appalachian School of Law, to Diane Kenty, ADR Director, CADRES (Sept. 6, 2005) (on file with author) (analyzing the confidentiality of the information appearing on the Maine CADRES Complaint Log at App. G to this article).

vii. Immunity for Persons Handling Complaints

The Maine Operational Rules give immunity to “ADR providers under contract with the Judicial Branch” from liability for actions taken in connection with the Maine Operational Rules.⁷⁶⁶ The ADR Director has the same grant of immunity.⁷⁶⁷ Thus, the rules protect the ADR Director when she handles ethics-related complaints involving rostered mediators. The rule does not specify whether the grant of immunity from liability is absolute or qualified. However, the CADRES Committee is granted absolute immunity for actions taken as “persons acting on behalf of a governmental entity in any official capacity, whether temporarily or permanently”⁷⁶⁸

G. Summary and Analysis of Mediator Complaint Systems

Virginia, Georgia, and Minnesota make access to complaint forms, ethical rules, and complaint procedures easily available to the public on court-sponsored websites. Florida and Maine also have websites that can provide links to information about the complaint process, but they do not provide complaint forms or easily identified access to the complaint procedures.⁷⁶⁹ Virginia, Georgia, and Maine use written post-mediation evaluation forms to help the directors in those states monitor mediator quality. These forms trigger a follow-up process in each state that may cause an unhappy party to file a formal complaint against a mediator. All of the states analyzed, except Maine, require written, signed complaints certifying the accuracy of the allegations made in the complaint.

The rules of the complaint procedure in Virginia, Georgia, and Maine delegate responsibility and discretion to the program directors to determine whether a complaint meets formal filing requirements and whether it states a claim under the ethics rules. These directors also serve as the investigators of the claims and are charged with evaluating, at least as the first step in the

⁷⁶⁶ MAINE OPERATIONAL RULES, *supra* note 706, at IV.

⁷⁶⁷ *Id.* Because the Maine Operational Rules govern the complaint procedures, the ADR Director appears to have immunity against liability for actions taken in handling complaints against mediators. *Id.*

⁷⁶⁸ ME. REV. STAT. ANN. tit. 14, § 8102 (Supp. 2004) (defining covered employees); ME. REV. STAT. ANN. tit. 14 §§ 8101–8103 (2003) (giving absolute immunity to all governmental entities).

⁷⁶⁹ As noted above, Sharon Press recognizes that regulators could require mediators to advise parties about the availability of a grievance process at the beginning or end of the mediation. Conference Transcript, *supra* note 88, at 18.

review process, whether the mediator has likely violated an ethics rule based on the available facts. In contrast, Florida and Minnesota require members of appointed review bodies to conduct the facial sufficiency analysis. These review bodies also investigate the claim, or in the case of Florida, they may hire an independent investigator.

Mediators defending claims in Florida, Virginia, and Georgia have 20 days to respond to the complaint and a specific list of possible rule violations. In Minnesota, a mediator may respond in 30 days, while the rules in Maine do not set a response deadline. If the mediator fails to respond to the complaint, the reviewing bodies in Florida and Minnesota may assume that the mediator admits the facts in the complaint. In Virginia, the mediator's failure to respond triggers a further investigation of the facts.

Accused mediators have varying levels of access to the investigative materials assembled by the directors or the review bodies. Generally, states provide limited access to the work product of the directors or review bodies. Florida provides the broadest disclosures to the mediator, including witness statements. Maine also provides broad disclosures by giving the mediator access to the complaint and the information developed by the ADR Director during her investigation. Virginia's rules do not sufficiently address the permitted disclosures. Florida, Georgia, and Minnesota give at least one of the bodies regulating mediators the power to subpoena witness testimony and documentary evidence.

None of the grievance programs specifically address accommodations for persons with disabilities or for persons who may not speak English fluently.⁷⁷⁰

All the states allow the person or entity first considering the matter to hold a meeting with the parties to attempt an early and more informal resolution of the grievance. In Florida, the parties must attend any scheduled meeting. In Minnesota, the parties must consent to the meeting. Maine holds this informal meeting at the CADRES Committee appeal level.

Only Georgia includes lay people on the adjudicatory hearing panel. Four of five states provide for an adjudicatory hearing with some right of reconsideration, review, or appeal. Maine does not provide this step in the process. The adjudicatory hearing typically follows a decision that the mediator has likely violated a rule. In Florida, Virginia, and Minnesota, the

⁷⁷⁰ See NATIONAL STANDARDS, *supra* note 8, § 1.1 (all persons should have equal access to the court-connected service); § 1.2 ("Each court should develop policies and procedures that take into consideration the language and cultural diversity of its community at all stages of development, operation and evaluation of court-connected mediation services and programs.").

first level review body makes the decision to forward complaints with merit to a hearing panel. In Georgia, either the mediator may request a hearing or the Committee on Ethics may set the complaint for hearing on its own motion.

In Florida, the regulators may not impose a sanction without holding an adjudicatory hearing. In contrast, the Maine ADR Director may impose sanctions without holding a formal hearing. All the states analyzed allow the regulators to de-roster a mediator. However, only Georgia specifies when that sanction is appropriate and no state, except Maine, will de-roster a mediator without a formal hearing. In fact, in Florida, this action may require a second hearing proving that the mediator failed to comply with the less onerous sanctions first imposed.

Only Florida permits the regulators to hire an independent prosecutor. Florida and Minnesota require proof of an ethical violation with clear and convincing evidence. Georgia requires only a preponderance of the evidence to prove an ethical violation. Virginia and Maine do not specify the burden of proof imposed on the regulating body.

Florida, Virginia, Georgia, and Maine only allow the mediator to request review of any adverse decision of the hearing panels. Minnesota allows either the mediator or the complainant to appeal any adverse decision to the full membership of the ADR Review Board. Only Virginia allows the complainant to seek review of any decision dismissing the complaint.

Only Florida permits an appeal to a court of law or to the chief justice of the supreme court. Virginia only permits reconsideration of the sanction decision by the same body that initially made the decision. Minnesota allows an appeal to the full membership of its ADR Review Board. Georgia and Maine allow an appeal to an oversight commission or committee. Florida, Georgia, and Minnesota specify the standard of review on appeal, review, or reconsideration, but each state has chosen a different standard. Virginia and Maine do not specify the standard of review.

The rules of confidentiality that affect the proof, defense, investigation, and publication of grievance-related information vary greatly among the analyzed states. In all states but Maine, the mediation confidentiality statute exempts certain mediation communications needed to prove or defend a claim. Florida makes available to the public more grievance-related information than any other analyzed state, even publishing information about the complaint and its resolution when its regulators dismiss a claim against a mediator. Virginia makes available only information about formal complaints and their resolution. Similarly, Georgia publishes only the complaint, the response, and the final decision for complaints leading to a sanction. If the complaint does not lead to a sanction, Georgia publicly acknowledges only

the filing of the complaint. Minnesota publishes only the sanction decision. After the ADR Review Board issues a sanction, Minnesota will publish information about the sanction. Maine has no specific rule on what part of the grievance process the director may publish. As a result of the limited disclosures allowed by state statute or rule, the grievance data published in Virginia, Georgia, Minnesota, and Maine does not serve the educational function it could if the rules or statutes provided greater public access to the information about all filed grievances, as they do in Florida.⁷⁷¹ The limited disclosures may also undermine public confidence in the mediator disciplinary systems, and as discussed above, the courts referring cases to mediators.⁷⁷²

In addition, the type of immunity conferred on persons handling grievances varies from absolute in Florida and Maine (for some participants) to none in Virginia. Georgia and Minnesota provide a qualified immunity for persons handling complaints.

Florida, Virginia, Georgia, and Minnesota tie the complaint analysis and the disciplinary process back to specific provisions of the applicable code of ethics. Florida and Virginia provide the most detailed codes, but Georgia and Minnesota have provided interpretive comments to the provisions of their codes. Maine's code appears modeled on a judicial code of ethics and fails to reflect more recent thinking about mediator ethics. Thus, the ADR Director has not always tied the allegations arising in disciplinary process back to specific provisions of the code.

More generally, Florida provides mediators the most due process protections in the grievance process by providing four levels of review, with each level of review having a clearly defined function. It also has in place

⁷⁷¹ By comparison, the lawyer disciplinary systems in 36 states open the proceedings to the public with the filing of formal charges against the lawyer.

Arizona, Florida, and West Virginia make all records accessible to the public after a finding of probable cause or dismissal for lack of probable cause and Oregon is entirely open from the filing of the complaint. Among 11 jurisdictions which are not considered 'open,' Alabama, Delaware, Kentucky, and South Dakota make the matter public after the Board recommends public discipline.

Geoff Yuda, *Disciplining Pennsylvania Lawyers: How Public Should it Be?: Lawyers and the Public Register Their Views About Proposals for a More Open Review Process*, 27 PENN. LAW. 40, 41 (Jan.-Feb. 2005). Thus, the mediator disciplinary systems in four of the five states analyzed in this article make less information available to the public than most states make public in connection with lawyer disciplinary proceedings.

⁷⁷² *Id.* at 40-48 (describing Pennsylvania's effort to make all attorney disciplinary information available to the public to increase public confidence in the disciplinary system, and by association, the judicial system).

several steps in the process designed to weed out frivolous complaints. The clearly delineated burden of proof and standards of review on appeal provide additional due process protections for mediators. Florida mediators also have greater access to information relating to the complaint, including witness statements.

Maine offers mediators the least due process protections, consolidating in the ADR Director responsibilities that include starting the grievance process against mediators, determining whether a complaint states a claim under the ethics rules, investigating the claim, determining whether the mediator has likely violated an ethics rule, meeting with the mediator to discuss the matter, and imposing—without conducting a formal hearing—a number of sanctions, including de-rostering. An appeal to the CADRES Committee after the ADR Director imposes a sanction is the only check on the decisions made in the process. Moreover, a Maine mediator would have more difficulty determining which behaviors the ADR Director may deem inappropriate under the applicable standards.

The rules governing mediators in Maine grant great discretion and responsibility to the ADR Director to ensure the quality of the mediation services provided to courts and litigating parties. However, the tools given to the ADR Director to perform those tasks are the least developed of any state examined in this article. Overall, the Code of Conduct and the Maine Operational Rules do not reflect increasingly well-accepted standards of mediator ethics, confidentiality, or party self-determination. The rules governing complaints against mediators often use ambiguous language that does not tie sanctions to specific violations of the Code of Conduct, do not state decisionmaking standards either at the level of the ADR Director or at the level of appeal before the CADRES Committee, and outline a very informal process that may undermine due process protections the field may agree should exist when a mediator faces a significant loss of income or damage to his or her professional reputation. The ADR Director has indicated that she is engaged in a “complete overhaul” of the policy and procedure manual, which presumably covers many of the rules and procedures discussed in this article.⁷⁷³

The systems of Virginia, Georgia, and Minnesota fall somewhere between the systems of Florida and Maine in providing specific ethical guidance to mediators, following more fully developed rules governing the grievance process, and offering mediators procedural fairness and due process protections.

⁷⁷³ E-mail from Diane Kenty, *supra* note 172.

Taken together, the processes and sanctions developed in each state analyzed still make the complaining party a spectator or witness to the grievance process rather than an active participant. The remedies protect the mediators, the mediation process, court programs, and the field without necessarily providing a meaningful remedy to the complaining party.⁷⁷⁴

H. Grievance Systems on the Drawing Board

1. Initiatives in North Carolina to Revise its Formal Complaint System

i. Introduction

North Carolina experimented with court-connected mediation as early as 1989 in the family court context.⁷⁷⁵ In the following year, bar leaders drafted proposed legislation to establish a "Mediated Settlement Conference" pilot program based on the experiences of Florida.⁷⁷⁶ In 1991, the General Assembly approved the legislation with the support of the state bar, the chief justice of the supreme court, and other ADR supporters on the bench and in the bar. In 1995, the legislature authorized implementation of the program in superior courts throughout North Carolina.⁷⁷⁷ In the 2003/2004 fiscal year, the courts ordered 11,138 civil cases and 1,388 "family financial settlement" cases⁷⁷⁸ into mediation.⁷⁷⁹ During the 2003/2004 fiscal year, North Carolina

⁷⁷⁴ Telephone Interview with Christina Petrig, *supra* note 146.

⁷⁷⁵ ALTERNATIVE DISPUTE RESOLUTION IN NORTH CAROLINA: A NEW CIVIL PROCEDURE 37 (Jacqueline R. Clare et al. eds., 2003) (describing history of ADR in the state and serving as a guide to practitioners).

⁷⁷⁶ *Id.* at 42–43.

⁷⁷⁷ *Id.* at 44–45.

⁷⁷⁸ This mediation program helps separating couples resolve financial disputes. The North Carolina Court System, Family Financial Settlement Program, <http://www.nccourts.org/Citizens/CPrograms/FFS/Default.asp> (last visited Mar. 2, 2006).

⁷⁷⁹ LESLIE RATLIFF, REPORT OF THE NC DISPUTE RESOLUTION COMMISSION FOR FISCAL YEAR 2003/2004 3–4 (2004), <http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/AnnualReport.pdf> [hereinafter RATLIFF REPORT]. North Carolina courts also sponsor a child custody mediation program, staffed by paid state employees who are not included in these statistics. Telephone Interview with Leslie Ratliff, Executive Secretary, North Carolina Dispute Resolution Commission, in Raleigh, N.C. (Sept. 29, 2005).

certified 1,063 civil mediators and 215 family financial settlement mediators.⁷⁸⁰

ii. *New Legislation Governing Complaints Against Mediators*

On July 7, 2005, Governor Mike Easley signed updated legislation that had earlier authorized the North Carolina Supreme Court to adopt standards of conduct for mediators working in court-connected programs.⁷⁸¹ The earlier legislation authorized the Dispute Resolution Commission (DR Commission) to impose certification and annual recertification requirements for mediators and to charge fees for the certification process.⁷⁸² In addition, it authorized the court to develop standards for mediation training programs and procedures for enforcing the standards for certification and conduct, including decertification of mediators.⁷⁸³ The revised statute restates many of the provisions found in the earlier version of the statute, but adds eight new provisions dealing primarily with disciplinary actions against mediators.⁷⁸⁴ The new sections arose from an initiative taken by the DR Commission "to address an increasing number of disciplinary issues."⁷⁸⁵ The 2003/2004 fiscal report of the Executive Secretary to the Commission explains:

This [initiative] is due in part to new requirements for the reporting of disciplinary matters adopted by the Commission three years ago. Under the new reporting requirements, applicants for certification and certification renewal must disclose on their applications any of the following:

⁷⁸⁰ RATLIFF REPORT, *supra* note 779, at 4.

⁷⁸¹ N.C. S. Bill 806, 2005 N.C. Sess. Laws 167, § 7A-38.2(a), as amended, available at Westlaw 2005 NC S.B. 806 (NS) [hereinafter S. Bill 806]. Sections 1 and 3 of the S. Bill 806 became law effective October 1, 2005. Sections 2 and 4 become effective "when it becomes law." *Id.* § 5. The legislature authorized the court-connected mediation programs in 1995 legislation codified at N.C. GEN. STAT. ANN. § 7A-38.1 (West 2005) (superior court cases); § 7A-38.3 (farm nuisance cases); § 7A-38.4A (district court cases); § 7A-494, § 7A-495, § 50-13.1 (child custody and visitation cases); and § 50-21 (divorce mediation). The revised mediation statute applies to mediators handling superior court, farm nuisance, and district court cases. *See also* § 7A-38.2(a) (authorizing the N.C. Supreme Court to adopt standards for the certification and conduct of mediators; allowing the court to adopt procedures to enforce the standards).

⁷⁸² N.C. GEN. STAT. ANN. § 7A-38.2(d) (West 2005); Telephone Interview with Leslie Ratliff, *supra* note 779. Mediators who are not certified by the DR Commission may take cases so long as the litigating parties nominate them as the neutral. *Id.*

⁷⁸³ N.C. GEN. STAT. ANN. § 7A-38.2(a) (West 2005).

⁷⁸⁴ S. Bill 806, *supra* note 781, § 7A-38.2(e)-(j) (creating new sections of statute).

⁷⁸⁵ RATLIFF REPORT, *supra* note 779, at 4.

convictions, pending grievances filed against them with professional licensing/certification bodies, sanctions imposed on them by professional licensing certification bodies, and judicial sanctions. Also, this year the Commission saw an increase in the number of formal complaints filed against mediators by third parties . . . [The Commission has] begun . . . to re-draft the Commission's rules to both strengthen and clarify its investigative and hearing procedures and to insure due process rights of applicants and mediators.⁷⁸⁶

The DR Commission administers the standards, as a division of the Judicial Department, and is under the supervision of the Director of the Administrative Office of the Courts.⁷⁸⁷ The DR Commission consists of five judges; a superior court clerk; four certified mediators; two practicing attorneys who are not mediators, including one family law specialist; and three citizens "knowledgeable about mediation."⁷⁸⁸

The DR Commission has had in place an informal disciplinary process. It describes the applicable procedures in three short paragraphs appearing on the courts' website.⁷⁸⁹ An unhappy participant in the mediation may download a complaint at this site. The investigatory process begins when the Executive Secretary receives a sworn, written complaint by which the

⁷⁸⁶ *Id.* at 4-5.

⁷⁸⁷ S. Bill 806, *supra* note 781, § 7A-38.2; *see also* RATLIFF REPORT, *supra* note 779, at 2. The Commission has four committees: Executive Committee, Program Oversight Committee, Mediator Certification and Training Committee, and the Standards and Discipline Committee. The last named committee "reviews disciplinary matters self-reported by mediators or applicants for mediator certification and investigates and reviews complaints filed by litigants, attorneys, and others regarding mediator conduct." *Id.* at 4.

⁷⁸⁸ S. Bill 806, *supra* note 781, § 7A-38.2(c). A list of its members for the 2003/2004 year appears in the RATLIFF REPORT, *supra* note 779, at 2. At this time, the DR Commission does not include any members who could be called laypersons. Telephone Interview with Leslie Ratliff, *supra* note 779.

⁷⁸⁹ The North Carolina Court System, Complaint Process, <http://www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Complaint.asp> (last visited Mar. 2, 2006). The North Carolina Supreme Court has substantially revised the DR Commission's rules, including those rules governing mediator misconduct. E-mail from Leslie Ratliff, Executive Secretary, DR Commission, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Feb. 9, 2006, 10:18 EST) (transmitting Rules of the North Carolina Supreme Court for the Dispute Resolution Commission) (on file with author).

complainant agrees to the process set out in the complaint.⁷⁹⁰ Through September 2005, the DR Commission had conducted two formal hearings. The DR Commission has also imposed sanctions on mediators without holding a formal hearing. The Executive Secretary only recently created a log of these actions.⁷⁹¹ However, she reports that the complaints leading to the formal hearings involved attorneys who mediated disputes between separating couples and then represented one of the parties in later litigation.⁷⁹²

The revised statute creates a highly-developed enforcement structure allowing the chair of the DR Commission to hire an executive secretary and other staff and to hire special counsel to assist the DR Commission in conducting hearings related to certification, revocation of certification, or complaints against mediators or training programs.⁷⁹³ The DR Commission may also hire counsel to handle appeals of the DR Commission's decisions on these matters.⁷⁹⁴ In connection with these activities, the statute authorizes the DR Commission to administer oaths to witnesses, subpoena evidence, and apply to the superior court for orders needed to perform its enforcement function. It also provides for appeals of the DR Commission's decisions to the General Court of Justice, Wake County Superior Court Division. It thus

⁷⁹⁰ Dispute Resolution Commission Complaint, Form AOC-DRC-05, *available at* <http://www.nccourts.org/Forms/Documents/624.pdf>. Unlike any other state analyzed in this article, the complaint form requires the complaining party to agree

that if the [DR] Commission finds that the mediator . . . is not guilty of the misconduct alleged in this Complaint and then further finds that this Complaint was made with the intent to harass or vex its subject, that [the complainant] may be liable for the costs associated with the hearing[.]

Id.

⁷⁹¹ See North Carolina DR Commission Complaint Log, a copy of which appears in Appendix H to this article. See E-mail from Leslie Ratliff, *supra* note 789 (transmitting North Carolina DR Commission Regulatory Activity 1995 to present). Appendix H does not include a complaint about a mediation trainer and a complaint concerning disclosures an applicant failed to make on his certification application.

⁷⁹² E-mail from Leslie Ratliff, Executive Secretary, N.C. DR Commission, to Paula M. Young, Assistant Professor of Law, Appalachian School of Law (Sept. 30, 2005, 13:41 EST) (on file with author).

⁷⁹³ Fees collected from mediators and from training programs for certifications and renewals have provided the budget for the DR Commission. In the 2003/2004 fiscal year, the DR Commission collected \$160,315 in fees. RATLIFF REPORT, *supra* note 779, at 3; Telephone Interview with Leslie Ratliff, *supra* note 779.

⁷⁹⁴ S. Bill 806, *supra* note 781, § 7A-38.2(e).

establishes only the second program allowing an appeal of a certification, renewal, decertification, or disciplinary decision to a court of law.⁷⁹⁵

The statute provides confidentiality for all information the DR Commission collects during the certification, renewal of certification, decertification, or complaint processes, with certain exceptions.⁷⁹⁶ Complaint information remains confidential until the DR Commission determines that a mediator or trainer has violated standards of conduct, violated other professional standards of conduct, violated program rules, acted inconsistently with good moral character, or acted in a way that reflects a lack of fitness to serve as a mediator.⁷⁹⁷

North Carolina had already established rules governing confidentiality in mediation. The rules create an evidentiary privilege for mediation statements and conduct and prevent their admission in "any proceeding . . . on the same claim."⁷⁹⁸ The new legislation creates additional rules governing confidentiality in "mediated settlement conference[s] or other settlement proceeding[s] conducted under this section."⁷⁹⁹ It creates an evidentiary privilege for statements and conduct made during the mediation session by all participants in the process, including neutral observers.⁸⁰⁰

The legislation provides for four exceptions to confidentiality:

(1) [i]n proceedings for sanctions under this section; (2) [i]n proceedings to enforce or rescind a settlement of the action; (3) [i]n disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or (4) [i]n proceedings to enforce laws concerning juvenile or elder abuse.⁸⁰¹

Thus, one of the exceptions permits disclosures required for the mediator disciplinary process. Also, a person may admit to evidence otherwise discoverable. Mediators cannot be compelled to testify or produce evidence

⁷⁹⁵ *Id.* § 7A-38.2(k). For the Florida appeal rights, see the discussion at *supra* notes 371–72 and accompanying text.

⁷⁹⁶ S. Bill 806, *supra* note 781, at § 7A-38.2(h) (DR Commission may publish the names, contact information, and biographical information for certified neutrals).

⁷⁹⁷ *Id.* § 7A-38.2(f)–(h).

⁷⁹⁸ N.C. GEN. STAT. ANN. § 7A-38.1(l) (West 2005) (applying in Superior Court-ordered mediations); *id.* § 7A-38.4(A)(j) (West 2005) (applying in District Court-ordered mediations). North Carolina is among the few states analyzed in this article that protects from disclosure conduct, as well as statements.

⁷⁹⁹ *Id.* § 7A-38.4A(j) (West 2005), as rewritten.

⁸⁰⁰ *Id.*

⁸⁰¹ *Id.*

concerning mediation statements or conduct, except to authenticate signatures to settlement agreements and to respond to proceedings to impose sanctions or otherwise discipline the mediator.⁸⁰²

The new legislation also contemplates ethical advisory opinions by granting confidentiality to the identity of persons seeking informal guidance from the Executive Secretary or written opinions from the DR Commission's Advisory Opinions Committee.⁸⁰³ The DR Committee has issued eight advisory opinions since 1999.⁸⁰⁴ An existing statute gives some guidance on the unauthorized practice of law. It explains that the "practice of law" does not include "the writing of memorandum of understanding or other mediation summaries by mediators at community mediation centers authorized by G.S. 7A-38.5."⁸⁰⁵ In addition, the North Carolina Bar Association Dispute Resolution Section's Task Force on Mediation and the Practice of Law issued "Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law" in 1999. The courts' website makes the document available to the public.⁸⁰⁶

Existing statutes establish immunity for neutrals who handle court-connected cases.⁸⁰⁷ The new legislation, however, does not provide

⁸⁰² *Id.*

⁸⁰³ *Id.* § 7A-38.2(h) (West 2005). In the past, the Executive Secretary of the DR Commission operated a "hotline" which allowed mediators to call for ethical guidance, even during a mediation session. The Executive Secretary logged receipt of the request for advice and a synopsis of the advice she gave. In that way, a mediator later accused of misconduct could show that he or she attempted to get advice at the time the ethical dilemma arose. When the mediator did not face time pressures, he or she could request a written ethics opinion from the committee. Telephone Interview with Leslie Ratliff, *supra* note 779; see also The North Carolina Court System, Advisory Opinion Policy, <http://www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Policy.asp> (last visited Mar. 2, 2006).

⁸⁰⁴ The DR Commission posts copies of its Advisory Policy and its Advisory Opinions on its website at <http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/AdvisoryOpinions.pdf>. The DR Commission's office will also send hard copies on request. RATLIFF REPORT, *supra* note 779, at 5.

⁸⁰⁵ N.C. GEN. STAT. ANN. § 84-2.1 (West 2005) (exempting from UPL the writing of memorandum of agreements by community mediators).

⁸⁰⁶ The North Carolina Court System, Mediator Conduct/Standards of Professional Responsibility, <http://www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Default.asp> (last visited Mar. 2, 2006).

⁸⁰⁷ N.C. GEN. STAT. ANN. § 7A-38.1(j) (West 2005); *id.* § 7A-38.4A(h) (West 2005).

immunity for members of the Commission and its staff for actions that they take in the certification, renewal, decertification, or disciplinary process.

During the fall of 2005, the DR Commission drafted the proposed rules to implement the legislation.⁸⁰⁸ The North Carolina Supreme Court will issue the final rules.⁸⁰⁹

2. Maryland Program for Mediator Excellence

i. Introduction

Maryland's judicial, mediation, and legal communities have designed—through a highly collaborative process⁸¹⁰—a program that encourages high quality mediation services without imposing strict credentialing requirements. The program is based on a “guildhall” model that encourages regular exposure of mediators to each other and to other styles of mediation.⁸¹¹ It also encourages ongoing education and skill development. The Maryland Program for Mediator Excellence (MPME) purportedly

⁸⁰⁸ See discussion *supra* note 789.

⁸⁰⁹ See *NC to Set Procedures for Handling Complaints Against Mediators*, ADRWORLD.COM, July 18, 2005, <http://www.adrworld.com/sp.asp?id=38663>.

⁸¹⁰ Chief Judge Robert M. Bell created the Maryland ADR Commission (Maryland Commission) in 1998. In 2002, the Maryland Mediation and Conflict Resolution Office (MACRO) succeeded the Maryland Commission as the design entity. Its office is part of the judicial branch of the state. Later, MACRO created the Maryland Quality Assurance Committee and sponsored more than 12 sessions, in two rounds of feedback, that allowed mediator groups, the ADR section of the state bar, judges, mediation program directors, and consumers of mediation services to provide information about the types of systems that would work to enhance and maintain mediation services in the state. Charles Pou, Jr. served as the consultant and over two and a half years assembled data on existing quality assurance systems used by other states and mediation organizations. A new 15 member Mediator Excellence Council will implement the Maryland Program for Mediator Excellence through task groups focused on specific issues. This article focuses on the work-product of the Grievance Process Committee. The Mediator Excellence Council plans to implement the Maryland Program for Mediator Excellence in Fall 2005. Charles Pou, Jr., *Scissors Cut Paper: An Innovative “Guildhall” Helps Maryland’s Mediators Sharpen Their Skills* 15, 18, 19, 21–22, 23 (June 28, 2005) (hereinafter Pou, *Guildhall*) (unpublished manuscript, on file with author); Roger Wolf & Toby Treem, *Growing Maryland’s Mediators: The Maryland Program for Mediator Excellence*, JUST. SYS. J., 2–3 (forthcoming 2006) (also describing the design history and elements of the program) (on file with author).

⁸¹¹ Pou, *Guildhall*, *supra* note 810, at 15.

“shuns regulatory systems and exclusionary practices,”⁸¹² but persons joining the program must (1) complete a basic mediation training course; (2) sign a commitment to seek self-improvement as a mediator by, among other things, taking five to ten hours each year of continuing education; (3) follow the Maryland Mediator Ethics Standards; (4) provide evaluation forms to their clients at the close of each mediation session; (5) provide some compilation of the evaluations to the MPME oversight committee to assist in further development of the field; and (6) participate in the MPME’s grievance process for resolving client complaints.⁸¹³

ii. *Proposed Maryland Mediator Grievance Ombudsman Process*

Maryland’s proposed Mediator Grievance Ombudsman Process (MGOP) shows a synthesis of the programs existing in five states, as well as some new thinking about handling mediator complaints. The proposal expressly states the values it seeks to reinforce. The task force designers envision the MGOP as a restorative program offering a

(1) a framework for building competency among mediators who are the subject of legitimate complaints, (2) a system of accountability within the mediation field, (3) a system of responsiveness to concerns and complaints about the mediation experience, (4) an opportunity to help people making complaints regain an understanding of mediation, its benefits and purpose, and (4) a tangible service to help build public trust and confidence in the mediation field.⁸¹⁴

The design task force understands that consumers and mediators must perceive the program as offering a procedurally fair process. It also hopes

⁸¹² *Id.* at 17.

⁸¹³ *Id.*

⁸¹⁴ MGOP Proposal, *supra* note 227, at 2. A 12 member committee made the proposal. Its members include mediators, lawyers, judges, and a social worker. The cover sheet to the proposal indicates that the design committee intended to add a consumer representative. *Id.* at 1. A group formed from the persons nominated by mediation service providers, mediation roster managers, consumers, community members, and private practitioners would be responsible for helping to make the public and the mediation community aware of the grievance ombuds program. This Advisory Committee would meet once a year. It would develop policy along with the MGOP Council. *Id.* at 4. See discussion *infra* notes 828–40 and accompanying text about the MGOP Council.

mediators will perceive it as a resource for them to improve their skills.⁸¹⁵ It reflects a “general consensus” expressed during the discussions held throughout the state about the MPME that mediators participating in the program should adhere to standards of practice and submit to a grievance process.⁸¹⁶

The system design contemplates three participating entities: the ombuds, the MGOP Council, and the Mediator Excellence Council (MEC). The designers have instructed the ombuds to resolve complaints “at the earliest stages—or lowest possible level—of the process.”⁸¹⁷ The grievance process applies, by agreement, to mediators who join the MPME. However, if the ombuds receives a complaint about a mediator who does not participate in the MPME, the ombuds may still attempt a facilitated dialogue leading to a conciliated resolution of the dispute “as a public service and to increase consumer confidence in mediation, even though the mediator is not required to cooperate.”⁸¹⁸

a. Ombuds Functions: Intake, Investigation, Conciliatory Resolution, Referral of Complaint to MGOP Council, and Statistical Reports

An ombuds—a part-time independent contractor to start—will further develop the complaint form and interview questions drafted by the Grievance Process Committee. The ombuds will use these materials to gather information about the complaint. The designers also expect consumers to file complaints by way of a toll free number, a web link, a fax number, or a postal address.⁸¹⁹ The proposal also seems to contemplate that the ombuds will help design the website for the program and participate in public awareness programs.⁸²⁰ The ombuds is charged with explaining the process to complainants and providing information about mediation that may help complaining parties better understand the merits of their complaint. The ombuds will explain the confidentiality rights of the complainant and his or her right to withdraw the complaint at any time.⁸²¹

⁸¹⁵ MGOP Proposal, *supra* note 227, at 3.

⁸¹⁶ *Id.* at 2.

⁸¹⁷ *Id.* at 6.

⁸¹⁸ *Id.* at 10.

⁸¹⁹ *Id.* at 3–4, 6–9.

⁸²⁰ *Id.* at 10–11.

⁸²¹ *Id.* at 6.

In addition, the ombuds will contact the mediator, but only with the complainant's consent. At this stage in the process, the ombuds will gather information about the complaint and begin to "take a conciliatory approach, working [as a conciliator, mediator, or facilitator] with both the complainant and the mediator to facilitate a dialogue that allows them to choose an appropriate outcome or resolution."⁸²² The ombuds may also encourage the parties to participate in mediation or another dispute resolution process independently of the ombuds.⁸²³

If these processes do not resolve the complaint, the ombuds will conduct a further investigation of the allegations. The ombuds may contact third parties for additional information, but only with the consent of the complainant.⁸²⁴

The proposal also envisions that the ombuds will "follow-up with complainants and mediators to see what actions have been taken and assess their effectiveness as resolutions."⁸²⁵ In addition, the ombuds will keep records of advisory opinions and any decisions made by the MGOP Council. He or she will compile annually, or as requested, data on the "number and nature of complaints received and resolved, without revealing information about individual complaints."⁸²⁶ A later provision of the proposal instructs the ombuds to prepare a "comprehensive written summary of each infraction and how the MGOP dealt with it."⁸²⁷

⁸²² *Id.* at 7.

⁸²³ *Id.*

⁸²⁴ *Id.* The designers' efforts to give control to the complainant over the investigation and progress of the complaint may run counter to the accused mediator's expectations about procedural justice. See discussion *infra* notes 863–85 and accompanying text.

⁸²⁵ MGOP Proposal, *supra* note 227, at 8.

⁸²⁶ *Id.* at 5. I recommend that the language in the final proposal be more specific about the information the ombuds can disclose to the public. It would seem impossible to describe the "nature of complaints" without revealing information about "individual complaints." *Id.* at 5. The design task force contemplates that the ombuds will not reveal the names or other identifying information of any complainant or accused mediator if the process does not result in a hearing or sanction. *Id.* at 7, 10–11. But the design task force still intends to give the ombuds the ability to summarize and publish the allegations of complaints and their disposition in the same way that Florida, Virginia, and Georgia do. Telephone Interview with Louise Phipps Senft, Chair, Maryland Grievance Process Committee, in Baltimore, Md. (Oct. 5, 2005). Without further clarification, however, the current guidelines on disclosures most resemble Minnesota's very restrictive confidentiality requirement.

⁸²⁷ MGOP Proposal, *supra* note 227, at 11. The summary should "assure consistency of outcomes, provide a teaching tool for the profession, establish precedent,

*b. MGOP Council Functions: Consideration of Complaint;
Possible Evidentiary Hearing*

Based on the investigation, the ombuds may decide to refer the complaint to the MGOP Council, along with his or her recommendations, but only with permission of the complainant.⁸²⁸ The MGOP Council will consist of five to seven "highly experienced mediators" chosen by MACRO with input from the Mediator Excellence Council (MEC).⁸²⁹ It will also include "one consumer at-large member."⁸³⁰ Its members will serve "rotating tenures" for three and five-year terms.⁸³¹ Council members are expected to be "on call" to respond within 48 hours "of being called for guidance on a particular complaint."⁸³² The proposal expects that the MGOP Council will hear complaints "about (a) violations of standards of practice or ethics . . . (b) disrespectful behavior, and (c) sexual or other harassment."⁸³³ If adopted, this program will have a broader jurisdictional scope than any other program analyzed in this article, except perhaps that of Maine.⁸³⁴ It seems to require a complainant to bring a complaint within one year of the mediation session

and ensure the integrity of the MGOP." *Id.* These disclosure goals enhance mediator competence, encourage ethical behavior, and provide procedural justice that enhances the reputation of the grievance process, mediation programs, and referring courts. But the imprecise language currently used in the proposal about confidentiality may undermine these goals.

⁸²⁸ *Id.* at 7. Thus, again, the designers give control over the process to the complainant. This approach, therefore, seems to assume that the process is intended to resolve disputes rather than to discipline mediators or to provide broader education to the mediation community. If the designers made the latter goals paramount, the MGOP Council could process complaints they believed had merit, even if the complainant was ready to "lump it." At the same time, in Florida and Georgia the hearing panel will dismiss a complaint if the complainant does not pursue it at this same step in the process. FLA. DISCIPLINE RULES, *supra* note 251, R. 10.810(h); GEORGIA ETHICS PROCEDURES, *supra* note 507, § II(J). In addition, by giving greater control over the process to the complainant, it may also enhance the complainant's perception of procedural justice. See discussion *supra* notes 861–62 and accompanying text.

⁸²⁹ MGOP Proposal, *supra* note 227, at 3.

⁸³⁰ *Id.* Accordingly, the designers plan to include consumers on this hearing panel, but they do not define "consumer." They may define it as court personnel or attorneys, depending on how they envision the consumers of mediation services.

⁸³¹ *Id.*

⁸³² *Id.* at 4.

⁸³³ *Id.* at 10.

⁸³⁴ See discussion *supra* notes 172–76 and accompanying text.

and so would be the only state to impose a statute of limitations.⁸³⁵ The designers of the grievance program also hope to prevent malpractice claims by recommending that the legislature pass a statute making the grievance process a step the complainant must complete before he or she can file a civil action against a mediator.⁸³⁶

When the ombuds refers a complaint to the MGOP Council, it will consider the allegations in the complaint, the results of the investigation, and the ombuds' recommendation. The proposal contemplates a multi-step process even at this stage of the complaint handling process. The MGOP Council may consult with the Advisory Committee, apparently about appropriate responses to the complaint. It may recommend an appropriate "restorative action" that the mediator may apparently accept. If the mediator does not accept the recommendation or adhere to it, the MGOP Council may then hold a hearing. The hearing will comply with the Maryland Court's Rules for Arbitrators and, because the MGOP Council will conduct it under the authority of the judiciary, it will be a non-binding arbitration proceeding.⁸³⁷ The proposal does not explain the next step in the process if either party refuses to be bound by the decision.

The proposal also permits the complainant and the mediator to bring a representative or support person into the process at any time, but it does not otherwise specify the due process rights of the mediator.⁸³⁸ The MGOP Council will make a sanctions decision⁸³⁹ within ten days following the

⁸³⁵ MGOP Proposal, *supra* note 227, at 10; *see also* Conference Transcript, *supra* note 88, at 16. During the conference presentation, Sharon Press noted:

[U]nder the Florida system there is no statute of limitation by which one can file a complaint. So . . . someone could have mediated in 1988 and show up at our door today, and there is nothing to say that we would dismiss that complaint. The good news is, that . . . nobody does that. The longest it's taken somebody [to file a complaint] is a couple of months, and then it was for really special circumstances.

⁸³⁶ MGOP Proposal, *supra* note 227, at 11. The Grievance Process Committee recommends that it get an advisory opinion from the Attorney General's Office on whether the proposal, or presumably the new ethics standards, could give rise to a new cause of action. *Id.* The proposal says nothing about mediator immunity or about immunity for persons handling complaints against mediators.

⁸³⁷ *Id.* at 7; *see also* Telephone Interview with Louise Phipps Senft, *supra* note 826. The proposal, however, says that the decision would be binding. MGOP Proposal, *supra* note 227, at 8. If the MGOP Council does not consider the matter or does not hold a hearing, the complainant may pursue the complaint in court. *Id.*

⁸³⁸ MGOP Proposal, *supra* note 227, at 7, 10.

⁸³⁹ The proposal never uses the term "sanctions." Instead, the proposal talks about "decisions." *Id.* at 8.

hearing, apparently after concluding that a preponderance of the evidence supports it.⁸⁴⁰

c. MGOP Function: Available Decision Options

As noted above, the proposal indicates that the MGOP Council may recommend to the parties that a mediator comply with a certain remedy. The MGOP Council can also impose a specified remedy. Those remedies are:

- Closing the complaint, with an explanation to the mediator and/or the complainant;
- Contacting a mediation program or roster manager or mediator certification group with concerns about the mediator and recommendations about how to address those concerns; *and/or*
- Training for the mediator at the [m]ediator's cost;
- Mediation observation at the [m]ediator's cost;
- Mentoring for the mediator at the [m]ediator's cost;
- Public service to benefit the complainant or the mediation community;
- A written apology;
- Giving the consumer back what was paid to the mediator;
- Paying restitution to compensate the complainant for damages;
- Paying for the cost of investigation;
- Sending a warning letter or written reprimand;
- Paying for the cost of hearing;
- Paying for the cost of appeal;
- Removing any MPME certification that may exist;
- Suspending a mediator from the MPME program;
- Removing a mediator from the MPME program.⁸⁴¹

Thus, like Florida, the MGOP Council would have broad authority to impose economic or monetary sanctions, as well as non-monetary sanctions.

d. Possible Appeal

The designers anticipate the ombuds and the MGOP Council will develop an appeal process that will involve an appeal to the MEC. It would

⁸⁴⁰ *Id.* at 10. Thus, Maryland plans to adopt the burden of proof used in Georgia. See discussion *supra* note 564.

⁸⁴¹ MGOP Proposal, *supra* note 227, at 8 (emphasis in original).

apply only to “mediators objecting to [MGOP] Council decisions.”⁸⁴² Thus, like Florida, Virginia, Georgia, and Maine, complainants unhappy with MGOP Council decisions would have no appellate recourse.

e. Confidentiality in the Grievance Process

As a policy statement, the designers plan to maintain confidentiality to the greatest extent possible.⁸⁴³ They do not explain the reasoning behind this statement or the choices made to implement the policy. The designers appear especially protective of the complainant’s identity, unlike any other program analyzed in this article. All information about the complaint, the complainant, and the mediator will remain confidential if the parties resolve the dispute without a hearing before the MGOP Council. If the MGOP Council intends to conduct a hearing, the ombuds will reveal the names of the complainant and mediator to the council.⁸⁴⁴ The proposal allows the mediator to reveal confidential mediation communications to the extent necessary to respond to the complaint.⁸⁴⁵

If the MGOP Council removes a mediator from the roster, that decision will not be posted on the MACRO website. Instead, MACRO will no longer list the mediator on its rosters, including the one that appears on the website.⁸⁴⁶ The confidentiality provisions of the proposal do not yet sufficiently coordinate with any rules or statutes governing confidentiality in mediation, the state’s Sunshine Law, or even with the goal of preserving confidentiality in the process, while providing educational information about how the ombuds or MGOP Council resolve each complaint.⁸⁴⁷

VII. DESIGNING MEDIATOR GRIEVANCE SYSTEMS

Nearly two decades ago, Ury, Brett, and Goldberg came to the central Appalachian coal fields to design a dispute resolution system for high-strike

⁸⁴² *Id.* at 11; *see also* Telephone Interview with Louise Phipps Senft, *supra* note 826.

⁸⁴³ MGOP Proposal, *supra* note 227, at 5.

⁸⁴⁴ *Id.* at 7.

⁸⁴⁵ *Id.* at 6.

⁸⁴⁶ *Id.* at 10. In other words, the designers have not decided to use public disclosure of the sanction as a warning to other mediators.

⁸⁴⁷ *See* discussion *supra* notes 812–15 and accompanying text.

mines.⁸⁴⁸ They outlined a three-step process: (1) diagnosing the disputes in the existing dispute resolution system; (2) designing an effective dispute resolution system using six basic principles; and (3) making the system work by involving the disputing parties in its implementation.⁸⁴⁹

A. Diagnosing the Disciplinary Disputes

The diagnosis step requires finding answers to at least the following questions: (1) What types of disputes arise? Who are the disputants? How frequently do they occur? What is causing the disputes?; (2) How are the disputes being handled? Do disputants lack available procedures for filing complaints? What do people do if they have a complaint? With whom, if anyone, do they bring it up? How frequently do disputants “lump it”? Are disputants “lumping it” because no established procedures exist to deal with complaints? What obstacles hinder the use of dispute resolution procedures? Do the procedures have to be actively administered by a person or institution? Is the lack of people, information, or institutions due to insufficient funding?; (3) Why do disputants use some procedures and not others? How is the surrounding culture affecting the procedures used? Do they know the procedures are available? Do they know how to use the procedures? If they use the procedures, do they use them effectively? Are they presenting evidence effectively? Do they make appropriate arguments?; and (4) Can new procedures meet the needs of disputants at lower costs?⁸⁵⁰

Most administrators of court-connected mediation programs would likely find it difficult to answer these questions as they relate to mediator misconduct, poor skill development, clumsy skill use, or unethical behavior. Most of these programs have no effective methods of obtaining participant feedback. Even among the five states analyzed in this article, only two rely on participant exit surveys to monitor mediator quality. As noted, most

⁸⁴⁸ See generally WILLIAM L. URY, JEANNE M. BRETT, & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1993). Based on the information disclosed in the book, the International Harvester mine that served as the focus for the research was located at Benham, Kentucky, less than two and a half hours from the campus of the Appalachian School of Law. See Kentucky Coal Mining Museum, <http://www.kingdomcome.org/pdf/MUSEUM.PDF>.

⁸⁴⁹ URY, BRETT & GOLDBERG, *supra* note 848; see also CATHY A. COSTANTINO & CHRISTINA S. MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (Jossey-Bass Inc. 1996); SPIDR & CORNELL UNIVERSITY, *DESIGNING INTEGRATED CONFLICT MANAGEMENT SYSTEMS: GUIDELINES FOR PRACTITIONERS AND DECISION MAKERS IN ORGANIZATIONS* (2001).

⁸⁵⁰ URY, BRETT & GOLDBERG, *supra* note 848, at 20–40.

unhappy participants seem to be “lumping it” with all the risks to the legitimacy of the courts, the field, and the process that go along with that form of conflict resolution. Professor Lisa Bingham recently called on courts to collect more data about their ADR programs.⁸⁵¹ As part of that data collection process, courts could begin soliciting from mediation parties regular post-mediation feedback and evaluations.

In addition, if the designer is trying to discern “what is causing the disputes” in the professional disciplinary context, he or she needs to know the professional standards that define the duties mediators owe parties. Most states have not provided even this essential element of the disciplinary system.

B. Designing the Disciplinary System

Ury, Brett, and Goldberg acknowledge the difficulty of designing a dispute resolution system. They suggest that parties do not move from the status quo until the “pain” of it gets too great.⁸⁵² Insiders often spearhead the change.⁸⁵³ In the context of mediator grievance systems, courts may not move to create the systems until they perceive that their own credibility and legitimacy are at stake. I can only hope that, as in the states analyzed, “insiders” including well-respected judges, lawyers, mediators, academics, and consumers of ADR services take the lead. Ury and his colleagues suggest the formation of a design committee,⁸⁵⁴ which all of the states analyzed in this paper have used to design and implement their disciplinary systems. As the Maryland MACRO process shows, the design process can be arduous, time consuming, expensive, and frustrating.⁸⁵⁵ Designers must plan for these challenges.

The design step relies on six basic principles: (1) focus on interests; (2) design procedures that encourage disputants to return to negotiation through “loop back” procedures; (3) provide low cost rights procedures that, if all else fails, will bring about a final resolution of the dispute; (4) prevent disputes whenever possible by building in a procedure for constructive feedback after a dispute; (5) arrange the different procedures in a sequence

⁸⁵¹ Bingham, *supra* note 214, at 122–25.

⁸⁵² URY, BRETT & GOLDBERG, *supra* note 848, at 65–66.

⁸⁵³ *Id.* at 66.

⁸⁵⁴ *Id.* at 69.

⁸⁵⁵ See discussion *supra* note 810; see also Telephone Interview with Louise Phipps Senft, *supra* note 826.

from least to most costly; and (6) provide motivation, skills, and resources necessary to make all the procedures work.⁸⁵⁶

For the most part, the state systems analyzed in this article adhere to these six basic principles. The systems are designed to elicit the underlying interests of the parties through informal consultations with the complainant and through factual investigations that involve the mediator and other parties with knowledge of the dispute. Many complainants seem satisfied with the types of remedial sanctions accepted by mediators or imposed by the regulatory body that encourage the mediator to improve his or her skills. A follow-up survey would confirm this hypothesis. Recall Clare's goal: "Maybe a complaint won't help me. But it might help someone else."⁸⁵⁷

All five state systems analyzed in this article provide for an informal meeting between the complainant and the mediator which attempts to resolve the dispute through a low cost negotiation process.⁸⁵⁸ All five states provide a low cost formal hearing procedure that, with or without another layer of review, can resolve the dispute with finality. At least in several of the states analyzed, the program administrators have used the grievance process to design better training programs for new and experienced mediators.⁸⁵⁹ In that way, the systems themselves help prevent future disputes.

The steps in the process are arranged to ensure that mediators need not respond at more formal levels to complaints that do not state a claim or do not survive a "probable cause" review. The steps in the process also attempt informal resolutions before the complainant must assume a more difficult burden of proof in the formal hearing process. And by statute or court rule, the courts have financial resources—often through a dedicated fund or fee—to hire skilled staff to manage the grievance system, maintain the information about complaints and procedures (especially the court websites), and conduct the early steps in the grievance process.

These states have also successfully managed the political tasks required to create these grievance systems. They have garnered support for the grievance systems and more importantly, the ethics codes that provide the

⁸⁵⁶ URY, BRETT & GOLDBERG, *supra* note 848, at 41–64.

⁸⁵⁷ See Appendix A, *supra* note 2. Diane Kenty, the Maine ADR Director makes the same comment: "[V]ery frequently [complainants] say, 'You know, I'm not so concerned about this for my own case, and specifically do not want to talk to the mediator about this, but I wanted you to know for further reference that this happened to me.'" Conference Transcript, *supra* note 88, at 41.

⁸⁵⁸ See Kovach, *supra* note 83, at 115–16.

⁸⁵⁹ Conference Transcript, *supra* note 88, at 21 (Sharon Press reporting that Florida uses the information available through the grievance process to design training programs for mediators).

normative values enforced by the systems. They have dealt with resistance to the grievance system, and more importantly, to the effort to mandate standards of ethical conduct. They have motivated people to accept a more regulated environment. They have adapted the grievance system to the particular program's needs. And they have involved a variety of stakeholders to participate in the design and implementation process. Some states, like Virginia, may have used a more "top-down" approach in designing the ethics code than Minnesota, but the process leading up to that point reflected an effort to obtain feedback about appropriate standards. In fact, Virginia's Standards of Ethics draw criticism today because they reflect a political process involving stakeholders who wanted more liberal rules about providing legal advice and case evaluations.

In most states, the courts relied on a design committee composed of highly respected members of the academic, legal, and mediation communities. In all states, the regulatory systems received high-level support from chief justices of the state supreme courts who showed great commitment to the use of ADR in the judicial branch. Most of these states started the ethics rules and grievance system design process in the early 1990s, relatively early in the life of the court-connected mediation programs.⁸⁶⁰ They dealt with opposition to the grievance system by making changes experimentally and by staying open to the need for additional changes in the process or in the ethics codes. Most of these states implemented the programs by providing additional incentives to learn more about the ethics codes and by making grievance decisions available to the public on court websites or through training programs. They provided coaching to help complaining parties get through the system successfully by acknowledging complaints, providing information required to file a complaint, by providing complaining parties a copy of the applicable ethics code and disciplinary procedures, and by keeping the complainant informed about the status of his or her complaint.

⁸⁶⁰ See discussion *supra* notes 240–47, 384, 619, 690–702 and accompanying text. Welsh & McAdoo note: "[P]utting together monitoring and evaluation mechanisms early is much easier than developing such mechanisms after a new program has developed its own vested constituencies." Welsh & McAdoo, *Look Before You Leap*, *supra* note 195, at 430.

1. *Meeting the Procedural Justice Expectations of Mediation Parties*

While these systems generally meet the design criteria of *Getting Disputes Resolved*, they often fall short of delivering the procedural justice complainants are likely to expect. Overall, the grievance systems analyzed still make the complaining party more of a bystander to the process rather than a direct participant. Typically, the complaining party has reduced access to information assembled in the investigation process. The grievance systems do not designate the complaining party as a party to the proceeding, but instead make him or her a witness—often deemed dispensable—in a proceeding that is based on a prosecutorial model rather than a civil suit model. The complaining party may therefore feel he or she has little “voice” in the process.

The complaining party may have little input into the sanction imposed and cannot hope, under the authorized sanctions in four states, to be made whole financially through economic sanctions. In four of the states analyzed in this article, the complaining party may not seek review or appeal of an adverse decision made by the program staff, the investigatory body, or the hearing panel. These limitations may affect complaining parties’ perceptions of procedural justice as it relates to meaningful consideration by the third party and of the respect and dignity they receive in the process. Moreover, only one state allows laypersons to serve in the third-party role. Thus, a process lacking in procedural justice may feel even more biased if the complaining party perceives that the regulators are simply protecting “their own.” Recall Clare’s concern: “How do I distinguish myself seriously to the parties that handle such things? If other attorneys are reviewing and investigating, why would that be fair?”⁸⁶¹

Welsh’s research underscores why system designers should keep in mind the pool from which they draw mediators, or in the case of grievance systems, the backgrounds of the members serving on the investigatory bodies or hearing panels. In her research involving special education mediations, she found that parents of children with disabilities made up a small percentage of the mediator pool. Instead, experience in education largely affected who administrators accepted into the pool of mediators.

⁸⁶¹ See Appendix A, *supra* note 2; see also Conference Transcript, *supra* note 88, at 8–9 (Leila Taaffe noted: “[O]ne of the complaints often . . . leveled against the bar or medical professional is that they aren’t hard enough on their own . . . [A]nd that’s why many [malpractice] cases go to court.”).

It is revealing that experience as an educator was considered helpful while experience as a parent was not. These selection criteria may need to change in order to enhance mediation's capacity to send a stronger signal, particularly to parents, that mediation is meant to facilitate *reciprocal* voice, *reciprocal* consideration, and *joint* problem solving.⁸⁶²

Similarly, bodies regulating mediators may need to show greater diversity by including lay people and other consumers of mediation services.

2. Meeting the Due Process Expectations of Mediators

At the same time, mediators pulled into the grievance process by a complaining party may have very different perceptions of procedural justice, especially if the mediators are also lawyers. They may be looking for more formal and more familiar touchstones of neutrality, even-handedness, and respect. They may have greater expectations about traditional due process protections.

Welsh's research indicates that parties' perceptions of procedural justice may be colored by the role they play in the dispute. Thus, in special education mediations, parents sought a process that gave them opportunities to thoroughly explain their child's needs to school officials. "The parents [did] not view mediation as a means to change the power relationship with the school officials. Rather, they view[ed] mediation as a means to achieve the respect and attention that they deserve[d] from public officials, if only temporarily."⁸⁶³ Parents also did not readily perceive themselves as part of a problem-solving team, because the school officials had control over the knowledge and resources needed to develop and implement an educational program for the disabled child.⁸⁶⁴

School officials had slightly different needs. They wanted parents to understand the norms the school officials could legally apply.⁸⁶⁵ But more importantly, school officials seemed to view mediation primarily as an

⁸⁶² Welsh, *Looking Glass*, *supra* note 185, at 660; see also Yuda, *supra* note 771, at 40 (acknowledging the public's perception that lawyers are "protecting their own" in disciplinary proceedings and reporting lawyer opposition to a proposal seeking to include lay people on lawyer disciplinary bodies).

⁸⁶³ Welsh, *Looking Glass*, *supra* note 185, at 654–55.

⁸⁶⁴ *Id.* at 655.

⁸⁶⁵ *Id.* at 581.

opportunity, in a calm setting, for “one-way voice.” During the mediation school officials could hear and better understand the parents’ perspective.⁸⁶⁶

In the context of mediator disciplinary proceedings, a disparity in expectations about procedural justice may give rise to an expectation by the accused mediator of greater due process protections, especially if the mediators are also trained as lawyers.⁸⁶⁷ Hensler suggests that “[a]ccording ‘due process’ to individuals is equivalent to recognizing their status as members in good standing of their social group, which has a value to people that is independent of any effect process might have on outcome.”⁸⁶⁸ Thus, due process may take on more salience for mediators, who as a group are far more conscious of the importance of process as an independent value. Due process may also have higher salience for lawyer-mediators who may wish to guard their status as lawyers in a profession typically accorded high status.

The due process clause of the Fourteenth Amendment to the United States Constitution provides: “No state . . . [shall deprive] any person of life, liberty, or property, without due process of law[.]”⁸⁶⁹ Courts have interpreted the procedural due process doctrine arising under this constitutional amendment as limited to protecting individuals from an arbitrary and binding deprivation of rights by government entities.⁸⁷⁰ In a criminal context, due process requires: (1) the prosecution to provide the defendant formal notice of the charges; (2) the prosecution to show in a probable cause hearing before a neutral magistrate that he or she believes the defendant has committed a crime; (3) the court to appoint a lawyer for an indigent defendant; (4) the court to allow a defendant to call witnesses on his or her behalf and to cross-examine adverse witnesses; (5) an impartial jury to try the case; and (6) a lawyer to represent the defendant at trial if the defendant wishes. Due process also protects a defendant from self-incrimination.⁸⁷¹

Due process protections also apply in disciplinary proceedings because every professional has a protected interest in pursuing his chosen profession

⁸⁶⁶ *Id.* at 656. Bingham reports that supervisors participating in the U.S. Postal Service’s REDRESS® program expressed greater satisfaction with the mediation process than did employees, suggesting some difference in the parties’ expectations about procedural justice. Bingham, *supra* note 214, at 113.

⁸⁶⁷ Welsh suggests that the U.S. Supreme Court’s due process jurisprudence focuses on ensuring the “accuracy” of the decisionmaking. In that way, it is outcome, rather than process, oriented. Welsh, *Hollow Promise*, *supra* note 193, at 187–90; Welsh, *Looking Glass*, *supra* note 185, at 664.

⁸⁶⁸ Hensler, *supra* note 8, at 93.

⁸⁶⁹ U.S. CONST. amend. XIV.

⁸⁷⁰ Welsh, *Hollow Promise*, *supra* note 193, at 188.

⁸⁷¹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 7–13 (3d ed. 2002).

free from unreasonable government interference.⁸⁷² A license to practice one's profession is a property right deserving constitutional protection.⁸⁷³ However, as the Supreme Court noted in *Morrissey v. Brewer*, "[d]ue process is a flexible concept and the form of procedural protection varies according to the particular situation."⁸⁷⁴ Some controversy exists as to what due process principles should apply to disciplinary proceedings. Some persons argue that the proceedings are more criminal in nature and that criminal due process protections should apply. Others persons argue that the proceedings are civil in nature and rules of civil procedure should apply. Still others believe that disciplinary proceedings are neither criminal nor civil, but rather have a nature all of their own⁸⁷⁵ because a professional can be disciplined for violations which are not criminal in nature or that do not involve fault.⁸⁷⁶

In *In re Ruffalo*,⁸⁷⁷ the Court characterized disciplinary proceedings as "adversary proceedings of a quasi-criminal nature." The Court reasoned that the boards should be required to inform a respondent of the charges against him before the disciplinary proceedings commence. Later cases at the state and federal levels have interpreted *Ruffalo* as not requiring "the full panoply of rights afforded to an accused in a criminal case."⁸⁷⁸ As one legal ethics scholar explains:

⁸⁷² *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (revocation of the security clearance of a government contractor's employee).

⁸⁷³ *Id.*; see also *Beauchamp v. De Abadia*, 779 F.2d 773, 775 (1st Cir. 1985) (finding physician had a protected interest in his license to practice medicine); *Keney v. Derbyshire*, 718 F.2d 352, 354 (10th Cir. 1983) (finding that a license to practice medicine is a property right deserving constitutional protection, including due process); *Padilla v. Minn. State Bd. of Med. Exam'rs*, 382 N.W.2d 876, 882 (Minn. Ct. App. 1986) (finding doctor's due process rights were not violated when board applied evidentiary rules used in contested cases). No court has yet resolved whether a mediator, who is not typically licensed by a state, would have the same due process protections as state licensed professionals.

⁸⁷⁴ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (due process requirements for parole revocation).

⁸⁷⁵ See *In re Echeles*, 430 F.2d 347 (7th Cir. 1970) (attorney disbarment); *Burns v. Clayton*, 117 S.E.2d 300 (S.C. 1960) (attorney disbarment and public reprimand).

⁸⁷⁶ Examples include mental infirmity or other disabilities.

⁸⁷⁷ *In re Ruffalo*, 390 U.S. 544, 551 (1968).

⁸⁷⁸ *Razatos v. Colo. Sup. Ct.*, 746 F.2d 1429, 1429 (10th Cir. 1984) (quoting *People v. Harfmann*, 638 P.2d 745 (Colo. 1981)), cert. denied, 471 U.S. 1016 (1985) (attorney suspension); see also *In re Evans*, 834 F.2d 90 (4th Cir. 1987) (attorney disbarment); *Comm. on Prof'l Ethics & Conduct v. Durham*, 279 N.W.2d 280 (Iowa 1979) (attorney suspension); *In re Gillard*, 271 N.W.2d 785 (Minn. 1978) (judicial disbarment); *Miss. State Bar v. Young*, 509 So. 2d 210 (Miss. 1987) (attorney disbarment).

[T]he notice requirements in disciplinary cases may not be as stringent as those in criminal cases; there is no right to appointment of counsel; there is no right to a jury trial; the concept of double jeopardy does not apply; and the Fifth Amendment right against self-incrimination may be limited in disciplinary proceedings. Even though in some discipline systems the investigatory and adjudicatory functions of the state disciplinary agency are combined in a single body, this has been held not to violate due process requirements.⁸⁷⁹

Moreover, states do not agree on the discovery rights of accused professionals in disciplinary proceedings. While the professional generally has the right to present evidence, the right to discovery,⁸⁸⁰ as defined in the criminal process, does not exist.⁸⁸¹ In some states, like South Carolina, a party must show good cause to obtain discovery.⁸⁸² These rules may limit the ability of the professional to prepare a defense.

In addition, most professional disciplinary organizations impose confidentiality on some aspect of their proceedings or files. Disciplinary boards issue many reprimands or sanctions privately with no publication to

⁸⁷⁹ Timothy P. Chinaris, *Even Judges Don't Know Everything: A Call for a Presumption of Admissibility for Expert Witness Testimony in Lawyer Disciplinary Proceedings*, 36 ST. MARY'S L.J. 825, 870–71, nn.262–67 (2005); see also Andrea G. Nadel, *Extent and Determination of Attorney's Right or Privilege Against Self-Incrimination in Disbarment or Other Disciplinary Proceedings—Post-Spevack Cases*, 30 A.L.R.4th 243 (1984). Minnesota, for instance, has a multi-tiered lawyer disciplinary system. A complaint starts out with the Director of the Office of Lawyers Professional Responsibility. He may dismiss the complaint without investigation or refer the matter to the District Ethics Committee for investigation. After the committee reports its findings to the Director, he may dismiss the complaint, negotiate a probationary agreement with the lawyer, or issue an admonition “if the Director concludes that a lawyer’s conduct was unprofessional but of an isolated and non-serious nature.” MINN. RULES ON LAW. PROF. RESP., 52 MINN. STAT. R. 8(d)(2) (1999). The Director may also refer the matter to a Board Panel for a hearing. If the Board Panel finds that probable cause exists that the lawyer engaged in unprofessional conduct and believes the lawyer warrants public discipline, the Board Panel will instruct the Director to file a petition for disciplinary action in the Minnesota Supreme Court. The supreme court may then use a referee or its own personnel to hear evidence on the allegations in the complaint. The supreme court will then issue a disciplinary sanction. Throughout the process, one group of fact-finders makes recommendations to a decisionmaker, who has not heard the prior proceedings and testimony. *Id.* R. 6–14.

⁸⁸⁰ See *Netterville v. Mississippi State Bar*, 397 So. 2d 878 (Miss. 1981) (attorney private reprimand).

⁸⁸¹ *In re Application for Disciplinary Action Against Peterson*, 446 N.W.2d 254, 256 (N.D. 1989) (attorney suspension and public reprimand).

⁸⁸² S.C. APP. CT. R. 413(25) (2003).

the public. These limitations put the accused professional at a disadvantage because they make it difficult, if not impossible, to research previous grievance dispositions.

Even if courts have allowed significant deviation from traditional due process protections in the disciplinary context, designers of a grievance system for mediators must still consider the due process elements required by law. Courts provide some guidance. First, the mediator should have proper notice of the charges made against him or her. Thus, the allegations in the formal complaint and the applicable standards of professional conduct cannot be overly vague. For instance, in Minnesota due process requires that "the charges of professional misconduct, though informal, should be sufficiently clear and definite, in the light of the circumstances of each case, to afford the respondent an opportunity to prepare and present his defense."⁸⁸³ Second, a professional has a right to an impartial adjudicatory panel,⁸⁸⁴ but as the discussion of the systems in five states indicates, some disciplinary rules do not have mechanisms for reconstituting the members of the decisionmaking body if the parties discover conflicts of interest or other potential biases.

Again, the process protections that may feel "fair" to an accused lawyer-mediator in a disciplinary proceeding may exceed the constitutional requirements of due process required by courts. Of the five states analyzed in this article, Florida has provided the most due process protections for mediators. It provides clear ethics standards and disciplinary rules.⁸⁸⁵ Florida makes ethics opinions and the disciplinary dispositions public. It has several steps in the process designed to weed out frivolous complaints. And it has learned over time to separate clearly the functions and bodies handling each step of the process. Maine, on the other hand, provides the least due process protections for mediators. It has a poorly conceived set of ethics standards and frequently ambiguous disciplinary rules. The Maine Supreme Court has also concentrated in the ADR Director great responsibility and discretion; and with that responsibility no demarcation between her roles as investigator, prosecutor, fact-finder, or sanction decision-maker.

⁸⁸³ *In re Peterson*, 110 N.W.2d 9, 13 (Minn. 1961) (attorney disbarment).

⁸⁸⁴ *In re Heirich*, 140 N.E.2d 825 (Ill. 1956) (attorney disbarment).

⁸⁸⁵ Kovach, *supra* note 83, at 115 ("[I]t is important that both the mediator and the consumer understand what kind of hearing may take place. Rules [about] the presentation of evidence should be specified.").

C. Implementing the Disciplinary System

Ury, Brett, and Goldberg also acknowledge the difficulty of implementing a dispute resolution system. To put the changes in place, they recommend: (1) motivating parties to use the new procedures; (2) demonstrating the procedures; (3) using peers of the community as proponents for the change; (4) setting specific goals about how grievances will be handled, i.e., all grievances will be settled within 30 days; (5) designing incentives to use the system; (6) publicizing early successes; (7) allowing designers to remain for a time as symbols of success and as watchdogs over the process; (8) training and coaching disputants in the process; (9) then evaluating whether the new system is working; and (10) diffusing the program to broader contexts, if appropriate.⁸⁸⁶

The grievance systems analyzed in this article have reached successful implementation based on most of these measures. Those states with continuing mediator education requirements often use programs approved for training to teach mediators about the grievance processes and the underlying ethical values they enforce. The court-connected mediation grievance systems would probably benefit, however, from better monitoring to see if they are working as intended or working as effectively as intended. Ury and his colleagues suggest that designers should also ask whether the newly designed system has negative or unintended consequences.

These grievance systems—limited to either court-connected programs or to certified, registered, or rostered mediators—have had little diffusion to other state mediation programs, to other states, and to a broader class of mediators. Perhaps the discussion in this article will encourage their broader diffusion.

VIII. CONCLUSION

While the mediation field may not be “all grow’d up yet,” even in its adolescent stage it requires structure, behavioral guidelines, and discipline. I have not found one scholar or commentator in the field who opposes the concept of complaint systems for court-connected mediation programs. In fact, scholars report “widespread” support for these systems. And even those persons most vocal about the need to avoid too much regulation of the field, recognize the need for enforceable behavioral rules for mediators—at least in court-connected mediation programs—to protect parties, referring courts, and the process. They also support mediator complaint processes. Yet, only a

⁸⁸⁶ URY, BRETT & GOLDBERG, *supra* note 848, at 75–83.

handful of states have implemented complaint systems and have dedicated the resources needed to manage and operate them. The current research does not identify why so many states or their supreme courts have failed to implement programs. I suspect strained court budgets play some role, but the inability to agree on a set of professional standards, the existence of mediator immunity, and a belief that parties do not complain about mediator performance may also play a role.

While formal complaints against mediators, either in the form of malpractice suits or grievance complaints filed with regulators of the profession, remain quite low, the research shows that many parties leave mediation unhappy about the mediator, the process, or the result. Those parties, possibly denied procedural justice in the mediation process, may need procedural justice in a complaint system to regain their faith in the judicial system and the process of mediation. I expect the field will continue to ignore the problem until mediators become more frequent targets of lawsuits and complaints to professional regulatory bodies. The field will respond because the complaint systems appear to protect mediators from the expense and bother of responding to frivolous claims of misconduct. As a field, are we mature enough to face our separate responsibilities to the third parties that use our services? Even rebellious adolescents know that sometimes you do things just because they are the right thing to do.

Appendix A

Clare Smith—09:49pm Feb. 15, 2004

Divorce Mediator in KY was biased—bar complaint?

What exactly is entailed in making a complaint on an unethical mediator?

I understand from my research that a mediator has an immunity similar to an attorney. The mediator held on obvious bias, and was allowed to create the divorce property agreement. My attorney did not intervene and actually assisted him in getting a signature.

I suspect money under the table amongst the parties involved and realize there is no way to prove it. The only thing concrete is that the agreement, which I was coerced to sign, was written with **his interpretation** of marital assets. In one such instance he wrote a value as being 6K when the actual value was 60K. I noticed there wasn't any documentation (supporting financial statements) filed with it when I went and reviewed the doc's at the courthouse later.

For what it's worth, during the mediation, the mediator made comments to my attorney, including, "She's young enough to get married before the alimony runs out, don't you think so?" as a reason for me being okay with what was presented! And also "sure, she's pretty enough to get married again in 4 years." (Oh boy, what fun. Let's keep things positive, hey?) There were recorded tapes of this at one point in time.

I refused to sign several times, my attorney then began yelling at me to "shut-up and sign the damn thing." I wasn't allowed to leave until it was signed. Yes, I realize this was very stupid, I didn't know how to stop it. I was, in fact, stunned by many things being said. The words, "NO I can't sign this," fell on deaf ears. I was so unfamiliar with the process of it all and what it meant and what the outcome entailed. My attorney wouldn't accept no and end the session. There were no provisions or deadlines on allocations.

There is so much more that was said and done. This is the short version. My attorney did not follow up and assist after having filed this handwritten agreement from the mediator with the courts.

I relied on my attorney to adequately represent me and protect my interests. It appears he knew what he was doing, and protected his interests, not mine. He reminded me, that this was legally binding as I had representation. He appeared proud of that.

I have no money to go back to court and modify anything, but the original attorney put me in that position to begin with, and then stopped working. This could have all been avoided with a properly worded agreement. There were many loopholes. My ex. can quote them all.

It wouldn't be so bad if I didn't have 3 children to care for and no health insurance. These folks were good enough to put me a few dollars above qualifying for welfare even though the ex has a substantial income and the marital assets included a significant pension. I did pursue contempt (non-compliance) as pro se (it took nearly a year to get the one small fund that was agreed to, mean time my house went into foreclosure).

Not knowing how to properly represent myself, I couldn't fix it. From what little I do know, all statutes of limitations have run out. Yes, I've done a lot of research trying to represent myself. Not much on Kentucky law was available on the internet at the time. It's only been very recently that the courts have put up websites. This area is very behind in information.

I've talked to quite a few attorneys trying to get representation too. No money = No representation.

I simply wanted a divorce and the freedom to move on with my life. I now have ulcers trying to rectify it all. (yes, it is serious)

Maybe a complaint won't help me. But it might help someone else.

How do I distinguish myself seriously to the parties that handle such things? If other attorneys are reviewing and investigating, why would that be fair? Do I have to offer proof and cite law of ethics in a complaint for it to be valid? What exactly can I prove?

I read somewhere that if you don't do it properly it will be thrown out, and given the volume of complaints, any reason is a good one for tossing.

Thank you for taking the time to read this. Any insight or assistance is appreciated.

Clare

PS—the ACLU and Legal Aid Society in this area do not deal with cases involving divorce—this involves the “new” family court system, mediation is required—I do not know how this mediator was chosen, likely by the ex's attorney.

Appendix B

Martin Cassman—01:28pm Feb. 16, 2004

Smith

Contact the Bar Association of the state in which the mediator was licensed and/or the court from which he receives assignments. File a complaint. Do not mention money under the table. It is not only likely untrue but makes you sound like just another disgruntled family law litigant.

If you were not allowed to leave until you signed the “dam” thing your attorney committed the felonious act of False Imprisonment. You are asking us to believe that you did not report this to the police, did not sue civilly, did not seek a legal malpractice attorney or take any steps to investigate the timely vindication of substantial rights which existed separately and independently from the underlying divorce action and any rights attaching thereto. That is simply not believable. In sum, with no proof of such misconduct, but having had the opportunity to at least contemporaneously file a police report and having not done so, it would be a miscarriage of justice for such an allegation to be given anything other than short shrift.

You have not informed us that you did not receive all benefits to which you were entitled under state divorce law, which, by the way, has been on the net for at least six years (on Findlaw since 1999 using the Cases and Codes link at the top of each Findlaw page i.e. <http://www.lrc.state.ky.us/krs/titles.htm>) and in local libraries many many decades longer than that. In every jurisdiction of which I am aware one is not entitled to a portion of a pension unless the marriage occurred during a part of the employment which resulted in the pension in which case one is only entitled to a pro rated share. In my jurisdiction one is not entitled to alimony unless the marriage lasted ten years or more and even then spousal support is subject to reduction based in imputed income and other factors.

Presumably the children would have had rights to insurance continuation under COBRA if they were the former spouse’s natural or adopted children and the former spouse was a member of a health plan.

Hopefully the above will point out some of the flaws in your presentation so that if you determine to lodge complaints with the Bar, you will do so in a manner that brings any possible legitimate cavils—assuming that there are some—to the fore.

Appendix C: Summary of Florida DRC Formal Complaints

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Circuit mediator/circuit case–Filed by party	# 2	10.110 (a)(1)	Failed to appropriately memorialize agreement within a reasonable period of time.	Dismissed for lack of jurisdiction.	Central	Hearing Panel dismissed for lack of jurisdiction because the incident occurred prior to the adoption of the ethics rules.
Circuit mediator/circuit case–Filed by party	# 4	10.110(b)(1), (b)(2) & 10.060(a), (b)	Concluded mediation without agreement. Undetermined self-determination.	Full hearing.	Central	Hearing Panel found no credible evidence to support the charge. Complainant appealed to Fla. Supreme Ct. under Rule 10.290. Mediator moved for dismissal, arguing that the appeals process was meant only for mediators who were sanctioned. Court dismissed appeal.
County mediator/county case–Filed by party	# 12	10.070(a), (a)(1), (a)(2) & 10.090(a), (b), (d)	Failed to remain impartial. Failed to withdraw from the mediation. Provided information he was not qualified to provide. Failed to advise parties to seek independent counsel when they did not understand how the agreement might adversely affect their legal rights and obligations.	Full hearing.	Central	Hearing Panel found that mediator only violated Rule 10.070(a) by failing to remain impartial in word, action, and appearance. Panel ordered mediator to attend an advanced mediation training program.

MEDIATOR COMPLAINT SYSTEMS

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
County mediator/county case–Filed by attorney	# 5	10.070(a)(1), (a)(2) & 10.090(d)	Failed to remain impartial. Failed to withdraw from the mediation. Offered a personal or professional opinion as to how the court would resolve the dispute.	Sanctions.	Southern	Complaint Committee found probable cause. Met with mediator and complainant. Mediator agreed to sanctions: to attend an advanced training course, to attend a dispute resolution conference, and to suspend doing any mediations until mediator completed training.
County mediator/county case–Filed by party	# 8	10.050(b); 10.090	Prolonged mediation session when party was unwilling to participate. Failed to postpone mediation when one party was unable to participate for physical reasons.	Sanctions.	Central	Complaint Committee found probable cause. Met with mediator and complainant. Mediator agreed not to conduct mediations by telephone conference call except upon written authorization of all parties.
Family mediator/family case–Filed by party	# 9	10.070(a), (a)(1); 10.090	Failed to remain impartial. Gave inappropriate professional advice.	Sanctions.	Southern	Complaint Committee found probable cause under Rule 10.010. Met with mediator and complainant. Mediator accepted sanctions: to attend a communications sensitivity session and to suspend doing any new family mediations until the mediator completed the sanction.
Circuit mediator/circuit case–Filed by parties	# 11	10.110(a)(1)	Used coercion and threats. Failed to cause the terms of an agreement to be memorialized properly.	Sanctions.	Central	Complaint Committee found probable cause on both allegations. Met with the complainant and mediator. Committee found mediator had violated Rule 10.110(a)(1). Mediator agreed to sanctions: to mediate only non-family cases (except pending cases) until mediator completed family mediation training program and until mediator obtained a family mediation certification. Agreed to waive fees earned from second mediation involving these parties.

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Circuit mediator/circuit case–Filed by parties	95-002	10.030(a); 10.070(a), (a)(1), (a)(2); 10.060(a), (b), (d); 10.090(d) & 10.110(b)(2)	Lacked integrity. Failed to remain impartial. Undermined self-determination. Gave professional advice. Failed to terminate mediation.	Sanctions.	Southern	Complaint Committee found probable cause on all allegations, except allegation relating to party self-determination. Mediator agreed to sanctions: to complete 20 additional hours of training and not to schedule any new mediations until mediator completed training.
County mediator/country case–Filed by party	95-003	10.030(a)(2)(A) & (B); 10.080; Fla. R. Civ. P. 1.730; Fla. Stat. § 44.102(3)	Spoke with judge during mediation.	Oral reprimand.	Southern	Mediator accepted an oral reprimand, which pointed out that the mediator should have reported to court only that the parties failed to reach agreement.
Circuit mediator/circuit case–Filed by party	# 1	No specific rules alleged.	Gave tax options to one party. Said he wanted to eat Thanksgiving dinner with his family, indicating impatience. Prolonged mediation past time the complainants were willing to participate, especially when one party had health condition. Complainant objected to filing with court a draft agreement that the party expected to re-write.	Dismissed for lack of jurisdiction.	Northern	Dismissed based on lack of jurisdiction because the entire complaint arose out of a mediation that occurred prior to the effective date of the ethics rules.

MEDIATOR COMPLAINT SYSTEMS

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
County mediator/county case-Filed by party	# 3	10.020	Used abusive and other behavior not befitting a mediator.	Dismissed as facially insufficient.	Central	Mediator sued party for non-payment of fees in small claims court. Court referred case to mediation and certified mediator handled it. Complainant filed complaint against Plaintiff/Mediator. Complaint Committee dismissed as facially insufficient.
Circuit mediator/federal case-Filed by party	# 6	No specific rules alleged.	Attorney required party to attend mediation against his/her wishes. Attorney was not prepared for mediation. Agreement written and signed was later changed.	Dismissed as facially insufficient.	Central	Complaint Committee dismissed as facially insufficient.
County mediator/no case-Filed by others	# 7	No specific rules alleged.	Engaged in false advertising. At a meeting of mediators, the mediator questioned qualifications of county court mediators.	Dismissed as facially insufficient.	Central	In a column in a local newspaper, the mediator used settlement statistics from county court mediation program, which were allegedly tied to his own personal, for-profit business and were misleading. Complaint Committee dismissed as facially insufficient.
Circuit mediator/circuit case-Filed by attorney	# 10	No specific rules alleged.	Allowed a student to attend the mediation without parties' consent. Did not inform parties of their roles or nature of mediation process. Failed to convey offers. Brought up a legal point favorable to one side. Biased. Determined that the case should be mediated exclusively by the attorneys, not the parties.	Dismissed as moot.	Central	Complaint Committee dismissed the complaint when it learned of the death of the complainant.

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Family mediator/family case-Filed by party	# 13	No specific rules alleged.	Failed to prepare. Gave no explanation of fees or costs. Arrived late and over billed time. Allowed one party to take a break, but not the other. Failed to write an accurate summary to the court. Filled out original mediation report negligently.	Dismissed at complainant's request.	Central	Complaint Committee dismissed when the complainant later filed a request that the complaint be dismissed because "many of the misunderstandings that occurred were because of [the other party]."
County mediator/county case-Filed by attorney	95-004	10.090; 10.060(d); 10.070(a), (a)(1)	Gave legal advice. Did not allow the attorney to speak without constant argumentative disruptions and topic changes. Continually tried to embarrass complainant because she was a "young female attorney."	Dismissed as facially insufficient.	Central	Complaint Committee reviewed the response by the mediator and dismissed the complaint, without prejudice, finding it facially insufficient.
Circuit mediator/family case-Filed by party	97-003	10.010(b); 10.050(a), (b); 10.060 (a), (b), (c); 10.070(a), (a)(1); 10.090(c), (d); 10.110(a)(3) & 10.110(b)(1), (2)	Showed gender bias. Used threats and coercion. Made verbal assaults. Would not allow party to obtain food at her request.	Dismissed by Hearing Panel.	Northern	Complaint Committee referred the case to a Hearing Panel after meeting with the mediator and complainant. Dismissed by Hearing Panel.

MEDIATOR COMPLAINT SYSTEMS

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Family mediator/family case-Filed by party	96-003	10.030(a)(2)(A); 10.060(a), (d); 10.110(a)(3), (b)(2); 10.070(a); Fla. Fam. L. R. 12.285	Failed to postpone mediation when one party did not prepare and present affidavits. Failed to assist parties in reaching an informed and voluntary settlement. Failed to promote a balanced process. Permitted an agreement when one party had insufficient bargaining ability.	Sanctions.	Northern	At the first meeting with the mediator and complainant, the mediator refused to accept sanctions. Complaint Committee forwarded issues—with an additional probable cause determination that he violated Rule 10.070(a)—to a Hearing Panel. At that point, the mediator agreed to sanctions: to conduct, without compensation, two mediations under observation by and with a critique from a certified family mediator approved by the Dir. of DRC, to observe two family mediations conducted by a certified family mediator, to complete a full day communications and listening course, and to refrain from scheduling new mediations until the mediator satisfied the sanctions.
Circuit mediator/federal case-Filed by party	97-008	10.100; 10.220(m)	Overcharged for services. Continued to assess fees past the time the mediation concluded.	Dismissed (violation of a technical nature).	Southern	After meeting with parties, Complaint Committee determined that although the mediator violated the rule governing fees, it was of a technical nature. Dismissed pursuant to Rule 10.220(m).
Circuit mediator/circuit case-Filed by attorney	98-001	10.030(a)(2)(A); 10.070(a); Fla. R. Civ. P. 1.720(b) & 1.730(a)	Failed to terminate mediation when one party was physically unable to participate.	Oral admonishment.	Southern	Mediator continued mediation when one party informed him that he could not be physically present. Mediator filed report with court stating that complainant and his client did not appear, but opposing counsel and his client were present and prepared. Mediator accepted an oral admonishment.

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Family mediator/family case-Filed by party	98-007	10.060(a); 10.110(b)(1); 10.030(a)(2)(A) 10.050(a); 10.070(a); Fla. Fam. L. R. 12.740	Attempted to engage party in mediation when party did not wish to participate. Reported to the court that party was uncooperative. Failed to provide an orientation to mediation. Relied on one party's information regarding issues in dispute.	Sanctions.	Southern	Complaint Committee conducted investigation and met with the mediator and complainant. Determined that mediator's conduct was unintentional, but violated rule. Mediator accepted sanctions: to complete a domestic violence training, to co-mediate five family mediations with an approved mediator, and to suspend further scheduling of family mediations until mediator had completed sanctions.
Circuit mediator/circuit case-Filed by attorney	99-004	10.050(a); 10.060(f); 10.080(a); 10.030(a)(2)(A); Fla. R. Civ. P. 1.730(a)	Informed parties of role as evaluator. Reported to court that complainant did not participate in good faith and that the lack of good faith was contemptuous of court's order. Undermined self-determination of the attorney.	Sanctions.	Northern	Complaint Committee met with mediator and complainant. Mediator agreed to sanctions: to send a letter of apology with a copy to the trial judge. To forego collection of fees in that mediation. To write an article (1) clarifying correct legal interpretation of confidentiality in mediation, (2) stating that no rule or statute requires "good faith" participation in mediation, (3) describing the information mediators may report to courts, and (4) clarifying the role of the mediator as not including the role of a juror.

MEDIATOR COMPLAINT SYSTEMS

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Family mediator/family case–Filed by party	99-005	No specific rules alleged.	Case was not appropriate for mediation. Mediator required parties to sign an agreement prior to mediation stating that only the mediator could declare an impasse. Charged excessive fees. Used coercion. Used profanity. Did not allow a partial agreement. Did not foster mutual respect. Failed to be impartial. Stated how the judge would rule. Did not give complainant opportunity to have attorney review agreement.	Sanctions.	Southern	Complaint Committee did not hire an investigator, but instead used information provided by complainant and mediator. Met with mediator and complainant. Mediator accepted sanctions: to forgive uncollected fees and return collected fees, to attend a Family Law Section CLE on mediation skills, to observe three complete family mediations involving pro se litigants conducted by certified mediator, and to refrain from conducting pro se mediations during the remainder of the calendar year.
Circuit mediator/circuit case–Filed by others	2003-002	10.040; 10.080(a); Fla. Stat. § 44.102(3)	Repeated an “untrue fact” about a mediating party in a subsequent, unrelated mediation, in which mediator acted as defense counsel.	Apology.	Northern	Complaint Committee hired an investigator. Committee met with mediator and complainant. Decided not to pursue complaint because the mediator recognized the violation and had already incorporated a heightened concern for confidentiality into his mediation practice. Mediator apologized for breach.

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
County mediator/CDS case— Filed by party	95-001	10.020; 10.060(a) & (b); 10.090(d)	Would not allow parties to define the issues. Seemed “adverse, even antagonistic” to the complainant’s concerns. Gave professional advice.	Dismissed for lack of probable cause.	Central	Complaint Committee hired an investigator. Dismissed for lack of probable cause.
County mediator/CDS case— Filed by party	96-001	10.050; 10.060(b), (d); 10.110(a)(3); 10.070(a), (a)(1); 10.090(c)	Arrived late. Used coercion. Failed to make provisions for complainant who suffers from panic attacks.	Dismissed (violation was minor and unintentional).	Southern	Complaint Committee found probable cause that mediator violated Rules 10.070(a) & (a)(1). Committee decided, pursuant to Rule 10.220(m), not to pursue the case because violation was minor, it was unintentional and may have resulted from mediator’s lack of sensitivity. Committee strongly recommended that mediator complete a course dealing with mediator ethics and sensitivity training.
Circuit mediator/circuit case—Filed by party	96-002	10.050(b); 10.110(a)(3); (b)(1), (b)(2); 10.060(a), (b); 10.090(c), (d); 10.070(a), (a)(1)	Pressed complainant to remain at mediation despite his desire to leave. Coerced party into signing agreement. Failed to remain impartial.	Dismissed for lack of probable cause.	Central	Complaint Committee hired an investigator. Dismissed for lack of probable cause.

MEDIATOR COMPLAINT SYSTEMS

Type of Mediator/Type of Mediation - Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Family mediator/family case-Filed by party	97-001	10.070(a); 10.060(a), (b); 10.060(a), (d); 10.090(c)	Failed to show concern or interest in matter. Made unprofessional statements. Did not allow complainant to make voluntary decisions. Refused to separate parties. Failed to remain impartial.	Dismissed for lack of probable cause.	Southern	Complaint Committee determined there was no probable cause to believe that misconduct occurred. Dismissed.
County mediator/county case-Filed by party	97-004	10.060(b); 10.070(a), (a)(1), (a)(2); 10.090(a), (b), (d)	Undermined self-determination. Failed to remain impartial. Gave professional advice.	Dismissed for lack of probable cause.	Southern	Complaint Committee hired an investigator. Dismissed for lack of probable cause.
County mediator/county case-Filed by party	97-005	10.060(a), (b); 10.070(a), (a)(1), (a)(2); 10.090(a), (b)	Undermined self-determination. Failed to remain impartial. Gave professional advice. Used coercion.	Dismissed for lack of probable cause.	Southern	Complaint Committee hired an investigator. Dismissed for lack of probable cause.
County mediator/condo case-Filed by party	98-002	No specific rules alleged.	Used coercion. Wrote an agreement that negatively affected complainant, which complainant signed under duress. Made inappropriate statements. Gave legal advice. Complainant had no voice in choosing mediator.	Dismissed for lack of probable cause.	Southern	Complaint Committee hired investigator. Dismissed for lack of probable cause.

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
County mediator/ no case–Filed by others	98-008	10.110	Provided inaccurate information on original application for mediation certification.	Dismissed for lack of probable cause.	Central	Mediator brought the inaccurate information to the attention of the DRC upon realizing the error. Mediator had answered “no” to a question asking whether he’d committed criminal activity. Mediator stated he’d been under the misconception that adjudication was withheld on a robbery he committed at age 19. Dismissed because mediator voluntarily disclosed misstatement. Mediator did not show lack of integrity or good moral character.
Family mediator/family case–Filed by party	98-009	10.030(a); 10.050; 10.110(b)(1), (2); 10.060(a), (b), (d), (e); 10.070(a), (a)(1), (a)(2)	Was abusive. Inappropriately prolonged session. “Dictated the solution he envisioned.” Attempted to intimidate.	Dismissed for lack of probable cause.	Central	Committee hired investigator and reviewed report. Parties entered consent agreement. Committee dismissed for lack of probable cause.
Circuit mediator/circuit case–Filed by party	98-010	10.050(b); 10.060(a), (b); 10.070(a), (a)(1); 10.090(d)	Never assisted in evaluating benefits and costs of mediation. Unnecessarily prolonged mediation. Unfairly influenced party. Unfairly self-determination. Failed to remain impartial. Gave professional advice.	Dismissed for lack of probable cause.	Southern	Complaint Committee conducted investigation. Dismissed for lack of probable cause.

MEDIATOR COMPLAINT SYSTEMS

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Circuit mediator/circuit case-Filed by party	2000-001	10.030(a); 10.060(a), (f); 10.070(a), (a)(1); 10.030(a)(3); 10.050(b); 10.060(a); 10.110(b)(1), (b)(2); 10.100(a)	Was biased. Undermined self-determination. Failed to remain impartial. Not competent. Prolonged the mediation past the point that complainants wished to participate. Charged excessive fees.	Dismissed for lack of probable cause.	Southern	Complaint Committee dismissed competence allegation as being without merit and hired investigator. Dismissed for lack of probable cause.
County, family, circuit mediator/ no case-Filed by other	97-002	10.030(a), (a)(1); 10.040; 10.120	Provided inaccurate information regarding his continuing mediation education.	Dismissed upon review of mediator's response.	Central	Mediator verified attending two workshops that he had not attended. Mediator said that rather than taking time to confirm his training attendance, he responded from recall. Complaint Committee dismissed upon review of mediator's response.
Circuit mediator/worker's compensation case (DoL)-Filed by party	97-006	10.060(a), (b); 10.070(a), (a)(1), (b)(2), (b)(3); 10.090(d); 10.110(a)(1), (2)	Undermined self-determination. Failed to remain impartial. Gave professional advice. Used coercion.	Dismissed for lack of probable cause.	Northern	Mediator had served as a judge on the case before retirement. Complaint Committee reviewed the responses and considered other factors. Committee dismissed case pursuant to Rule 10.220(f) for lack of probable cause.

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
County mediator/county case—Filed by party	97-007	10.110(a)(1), (b)(1); 10.060(a), (b)	Failed to allow termination of the mediation by the parties. Undermined self-determination. Changed agreement after a party signed it. Failed to capture correct information in the agreement.	Dismissed at complainant's request.	Central	Complaint dismissed, without prejudice, at request of complainant who decided not to pursue the complaint after it was filed.
County mediator/arbitration—Filed by other	97-009	10.130; 10.040	Engaged in false advertising. Did not meet responsibilities to courts.	Dismissed as de minimus violation.	Southern	Mediator had "Florida Supreme Court Certified Arbitrator Mediator" designation on his letterhead. That designation does not exist. Dismissed pursuant to Rule 10.220(m) because violation was minor and did not significantly prejudice interests of complainant. Mediator had already changed his letterhead and had no desire to deceive the public generally. He would not likely use designation in future.
Family mediator/family cases—Filed by others	98-003, et al.	10.070(a)(3), (b)(1), (b)(5); 10.040; 10.070(b)(5)	Failed to disclose mediator had served as a paid witness previously for one of the participating attorneys. Failed to remain impartial. Accepted a real estate listing arising from a mediation and thereby created a conflict of interest. Solicited business during the mediation.	Dismissed for lack of probable cause.	Central	Complaint Committee dismissed for lack of probable cause.

MEDIATOR COMPLAINT SYSTEMS

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
County mediator/county case-Filed by party	98-006	Fla. R. Civ. P. 1.730	Violated confidentiality. Was sarcastic and hostile during caucus. Failed to remain impartial. Gave legal advice.	Dismissed as de minimus violation.	Central	Complaint Committee found de minimus violation. Mediator conceded error. Dismissed.
Circuit mediator/federal case-Filed by attorney	99-002	10.020; 10.130(b)(1)	Made disparaging remarks about complainant, who was not a participant in the mediation.	Dismissed for lack of probable cause.	Southern	Complaint Committee dismissed for lack of probable cause.
Family mediator/family case-Filed by party	99-001	No specific rules alleged.	Made biased and disparaging comments about complainant in caucus with complainant's wife. "Mediator did not attempt mediation."	Dismissed as facially insufficient.	Central	Complaint Committee dismissed as facially insufficient.
County mediator/arbitration-Filed by other	99-003	No specific rules alleged.	Overcharged for services.	Dismissed as facially insufficient.	Southern	Complaint Committee dismissed as facially insufficient.
Family mediator/family case-Filed by party	2000-002	10.350; 10.370; 10.330; 10.310(a), (b); 10.320	Was not courteous or dignified. Gave personal opinion. Failed to remain impartial. Undermined self-determination.	Dismissed as facially insufficient.	Southern	Dismissed as facially insufficient because complainant failed to provide a date for the alleged activity. Committee sent complainant two letters requesting this information and it received no response.

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Circuit mediator/circuit case–Filed by party	2001-007	10.330(a); 10.340(a), (b); 10.370(c); 10.310(b)	Failed to remain impartial. Had conflicts of interest. Gave professional opinion. Undermined self-determination.	Dismissed for lack of probable cause.	Southern	Complaint Committee met with mediator and complainant. Committee dismissed for lack of probable cause.
Circuit mediator/circuit case–Filed by attorney	2002-001	10.380(c)(1) & (c)(2)	Never informed the parties of the mediator’s cancellation policy or minimum fees.	Sanctions.	Southern	Complaint Committee met with mediator and complainant. Mediator accepted sanctions: to refund fees associated with the mediation, to provide advance notice of mediation fees in the future, and to provide a copy of his engagement letter (including fee explanation) to DRC.
Family mediator/family case–Filed by party	2002-004	10.310; 10.330(a), (c); 10.360(a); 10.370(b), (c)	Provided legal advice. Undermined self-determination. Failed to remain impartial. Was biased. Breached confidentiality.	Sanctions.	Northern	Complaint Committee found complaint facially sufficient on all but the confidentiality allegation. Mediator claimed no mediation had taken place and she therefore could serve as complainant’s attorney. Committee met with mediator and complainant via video-conference. Mediator agreed to sanctions: to complete a minimum of eight hours of continuing mediator ethics education, to send a letter of apology to complainant, and to waive her right to attorneys’ fees from complainant.

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Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Non-certified mediator/family case–Filed by party	2002-006	10.210; 10.330(a), (b), (c); 10.370(c); 10.350; 10.310(a), (b), (c); 10.620	Yelled at party. Gave professional advice. Used profanity. Failed to remain impartial.	Full hearing.	Southern	Complaint Committee met with mediator and complainant. Mediator agreed to sanctions: to complete eight hours of continuing mediator education of which four hours focused on ethics, to observe two family mediations by a certified mediator, to conduct two family mediations under supervision, and to re-apply for certification. Mediator failed to comply with the sanctions in the time agreed. Committee reconvened and extended an agreement to mediator that called for payment of \$600 for costs incurred for the investigation along with an acknowledgment that mediator would not serve as a mediator in any court-ordered mediation from the date of agreement forward. Committee received no response from the mediator. Forwarded matter to Hearing Panel. Mediator signed amended agreement prior to hearing.
Circuit mediator/circuit case–Filed by party	2002-007	10.330(a), (b); 10.350; 10.370(c); 10.410	Failed to remain impartial. Used culturally insensitive term.	Oral admonishment.	Southern	Mediator denied having used an insensitive term. Complaint Committee, pursuant to Rule 10.810(D), received corroborating evidence that the mediator had made the statement. Committee met with mediator and complainant via teleconference. Mediator agreed to accept an oral admonishment.
Non-certified mediator/family case–Filed by party	2004-002	10.110; 10.220; 10.430; 10.500; 10.620; 10.310(d); 10.520	Let certification lapse. Refused to reschedule mediation.	Written reprimand.	Southern	Complaint Committee hired an investigator. Committee met with complainant and mediator via teleconference. Prior to meeting, mediator fulfilled requirements to be reinstated as a certified mediator. At meeting, mediator accepted written reprimand.

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Circuit mediator/circuit case–Filed by party	2000-005	10.310(a), (b); 10.330(a), (b); 10.370(a), (c); 10.340; 10.620	Undermined self-determination. Failed to remain impartial. Gave professional opinion. Used coercion. Had conflict of interest. Lacked integrity.	Dismissed for lack of probable cause.	Southern	Complaint Committee hired investigator. Dismissed for lack of probable cause.
Circuit mediator/circuit case–Filed by party	2001-002	10.370; 10.310(a), (b)	Gave professional advice. Undermined self-determination.	Dismissed for lack of probable cause.	Central	Complaint Committee hired investigator. Dismissed for lack of probable cause.
Family mediator/family case–Filed by party	2001-001	10.330(a); 10.340(a), (b), (c); Fla. R. Civ. P. 1.720(f)(2)	Scheduled mediation with opposing counsel without consulting complainant. Had conflicts of interest with the complainant and with the opposing party's counsel. Reviewed documents that complainant asked him not to review. Was biased. Was a party to a conspiracy to dismiss the complainant's case by filing a notice of impasse with court over complainant's objection.	Dismissed for lack of probable cause.	Central	Complaint Committee determined only impartiality and conflict of interest allegations were facially sufficient. Committee hired an investigator. Dismissed for lack of probable cause.

MEDIATOR COMPLAINT SYSTEMS

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Family mediator/circuit case-Filed by party	2001-004	10.330(a), (b); 10.370; 10.630; 10.640; 10.320; Fla. R. Civ. P. 1.720(f)(2)	Displayed anger and bias. Gave professional advice. Lacked skill and experience. Did not allow participation of three heirs.	Dismissed.	Southern	Complaint Committee added a possible Rule 10.520 (compliance with authority or court rules) violation and hired an investigator. Found no probable cause for violations, except Rule 10.520 and Fla. R. Civ. P. 1.720(f)(2). Dismissed pursuant to Rule 10.810(m) because of the short time that had elapsed between the expiration of the mediator's certification and her appointment as mediator. Her performance was not below professional standards. Her performance did not prejudice any of the parties or participants. Committee requested that its decision be forwarded to any committee reviewing a complaint against this mediator.
Family mediator/family case-Filed by party	2002-002	10.340; 10.210; 10.370; 10.310; 10.220; 10.230; 10.300; 10.380; 10.420; 10.600; 10.330	Had conflict of interest. Gave professional advice. Undermined self-determination. Presented her own proposal. Failed to provide a written explanation of fees. Failed to demonstrate professional competence, quality, or ethical practices. Failed to remain impartial.	Dismissed.	Southern	Complaint Committee found probable cause only on the alleged violation of Rule 10.380(c) (failing to provide parties with a written explanation of fees and costs). Committee dismissed pursuant to Rule 10.220(m) because parties had suffered no actual damages. The mediator had informed the parties orally of her fees. The mediator charged an hourly rate below her normal hourly rate. Complainant did not object to the announced fees at any time prior to or during mediation.

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Non-certified mediator/county case—Filed by party	2003-001	10.330(a), (b); 10.340(a), (b); 10.620	Had conflict of interest. Failed to remain impartial.	Dismissed.	Southern	Non-certified mediator denied he knew or had dealings with complainant. He questioned Complaint Committee's jurisdiction because he was not a certified mediator. Committee conducted investigation and requested copy of court order referenced in complaint. Complainant then admitted to mistakenly thinking the mediation was court-ordered and retracted his complaint. Dismissed.
Family mediator/family case—Filed by party	2004-001	10.230(b), (c); 10.310(a), (b); 10.420(b)(2); 10.410; 10.430; 10.380(a), (b)	Conducted mediation in an "unfair manner." Used coercion and intimidation. Undermined self-determination. Imposed unreasonable monetary and emotional costs.	Dismissed for lack of probable cause.	Central	Complaint Committee added possible violations of Rules 10.380(a) & (b), 10.410, and 10.430. Committee reviewed response and pre-mediation agreement. Dismissed potential violations of Rules 10.230 and 10.380. Committee investigated remaining allegations and found no probable cause.
Circuit mediator/circuit case—Filed by party	2004-004	10.350; 10.370(c); 10.330(a), (b); 10.410	Made biased comments. Unduly prolonged mediation past point when parties were likely to settle.	Dismissed for lack of probable cause.	Northern	Complaint Committee conducted investigation. Dismissed for lack of probable cause.

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Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Circuit mediator/mobile home case– Filed by party	2000-004	10.380(c); 10.330; 10.340; 10.370(b); 10.420(a)	Charged excessive fees. Failed to remain impartial. Had conflict of interest. Failed to advise party to seek independent legal advice.	Dismissed twice.	Central	Complaint Committee dismissed complaint as facially insufficient (without considering an attached, unsworn correspondence). Complainant refilled a notarized complaint. Committee found the allegations about fees and the orientation session facially sufficient. Committee found probable cause that mediator failed fully to inform parties of costs beyond their additional filing fee, but declined to refer matter to panel. Dismissed pursuant to Rule 4.810(m).
Circuit mediator/circuit case–Filed by party	2001-003	Fla. R. Civ. P. 1.730(b); Rules 10.520; 10.420(c)	Failed to reduce agreement to writing. Failed to comply with court rules.	Dismissed.	Central	Committee dismissed the case because the rules detailing the mediator's responsibility to properly memorialize agreement at end of mediation may be ambiguous to a reasonable person.
Family mediator/family case–Filed by party	2001-005	10.330(a); 10.230; 10.350; 10.410; 10.620; 10.220; 10.300; 10.310(b); 10.330(a); 10.350; 10.400; 10.410; 10.420(b)(2), (b)(3); 10.620	Was biased. Did not require full factual disclosure from party. Did not demonstrate dignified and courteous behavior. Proposed that mediator and opposing party and opposing counsel get a drink after the mediation. Allowed the mediation to continue in his office by the attorneys after complainant dismissed mediator.	Dismissed for lack of probable cause.	Northern	Complaint Committee reviewed the mediator's response. Dismissed for lack of probable cause.

Type of Mediator/Type of Mediation - Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Circuit mediator/circuit case-Filed by attorney	2002-003	10.220; 10.430; 10.520; 10.600	Failed to appear at a duly noticed mediation conference ordered by the court. Failed to comply with laws, court rules, etc.	Dismissed.	Southern	Mediator explained in his response that he missed mediation due to a medical condition. Complaint Committee found probable cause only on violation of Rule 10.430. Dismissed case pursuant to Rule 10.220(m) because the mediator offered unrefuted medical evidence; mediator was genuinely apologetic; and the referral of the matter to a panel would have been overly harsh considering the mediator's extensive professional experience and lack of prior history of violations.
Family mediator/family case-Filed by party	2002-005	10.340; 10.300; 10.330; 10.620	Had conflict of interest by acting as counselor and mediator. Failed to remain impartial.	Dismissed as factually insufficient.	Central	Complaint Committee reviewed mediator's response and dismissed the complaint, without prejudice, as factually insufficient.
County mediator/ no mediation-Filed by other	2004-006	10.110; 10.600; 10.620; 10.610	Misused office as a certified mediator to attract customers for his for-profit arbitration corporation.	Dismissed.	Northern	Complaint Committee dismissed, without prejudice, pursuant to Rule 10.810(h) governing preliminary reviews.
County mediator/county case-Filed by party	2004-009	10.300; 10.410; 10.520; 10.420(b)(3)	Failed to maintain balanced process. Failed to comply with laws, court rules, etc. Failed to accommodate disabled party.	Dismissed for lack of probable cause.	Northern	Complaint Committee added a possible violation of Rule 10.420(b)(3) (conduct of mediation). Mediator explained in response that he was chosen because of his special training and experience in mediating ADA complaints. Mediator also explained that when the other party expressed unwillingness to continue, he terminated mediation and returned case to the mediation director. Based on the mediator's response, Committee dismissed for lack of probable cause.

MEDIATOR COMPLAINT SYSTEMS

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
County mediator/county case–Filed by party	2000-003	10.060(b), (d), (f); 10.070(a)	Became angry when complainant requested mediator's name and background information. Failed to remain impartial. Used coercion. Was adversarial. Was disrespectful.	Dismissed as facially insufficient.	Central	Dismissed, without prejudice, as facially insufficient.
Family mediator/ no case–Filed by other	2001-006	10.810(a)	Had conflict of interest. Offered services as a mediator while acting as a counselor.	Returned for compliance with filing requirements.	Central	Complaint Committee returned the complaint to the complaining party for its lack of compliance with the filing requirements pursuant to Rule 10.810(a) without reviewing the substance of the complaint.
County mediator/county case–Filed by party	2004-003		Failed to provide an interpreter for non-English speaking party. Decided points of law. Denied complainant access to witnesses.	Dismissed as facially insufficient.	Southern	Complaint Committee dismissed as facially insufficient because complainant alleged no specific facts to support the complaint.
County mediator/county case–Filed by party	2004-007	10.420(b)(2)	Failed to terminate mediation when party was suffering from an anxiety attack.	Dismissed as facially insufficient.	Northern	Complaint Committee dismissed as facially insufficient because the complainant did not include an allegation that the mediation took place or that the mediator inappropriately failed to terminate it.
County/family mediator/county case–Filed by party	2004-008	10.350; 10.370(a); 10.410; 10.520	Failed to accommodate needs of disabled party. Forced case to go to trial instead of providing another mediator.	Dismissed as facially insufficient.	Northern	Complaint Committee dismissed as facially insufficient, without prejudice, because the complainant alleged no specific facts to support the complaint.

Type of Mediator/Type of Mediation – Source of Complaint	Question /Opinion Number	Rule(s) Allegedly Violated	Description of Alleged Violation	Disposition of Complaint	Division	Description of Outcome
Circuit mediator/circuit case–Filed by party	2003-003		Pending.		Central	
Family mediator/family case–Filed by party	2004-005		Pending.		Central	
Non-certified mediator/family case–Filed by party	2004-010		Pending.		Central	
Circuit mediator/circuit case–Filed by party	2004-011		Pending.		Northern	
Circuit mediator/circuit case–Filed by attorney	2005-001		Pending.		Southern	

MEDIATOR COMPLAINT SYSTEMS

Appendix D: Virginia DRS Log of Formal Complaints

Informal Complaint Received Date	Mediation Date	Virginia SOEs	Complaint Scenario	Mediator Complaint Panel Finding	Panel Appeal Outcome	Executive Secretary Finding Regarding Panel	Review Committee Finding	Committee Appeal Outcome	Final Resolution
8/15/96	8/10/96	Section G— Impartiality	Complainant alleged that the mediator showed sympathy to the other side. He also spent too much time trying to understand what happened. The party alleging bias was upset because the mediator cautioned him against “mud-slinging” when he brought up the opposing party’s cross-complaint alleging defamation of character. Complainant was also upset that mediator would not allow him to bring a gun into the session. Though both parties indicated that they wanted a second session, they could never agree on a date.	Even if the allegations were true, the complaint stated no violation of the Standard of Ethics (SOEs).					Mediator Complaint Panel (MCP) dismissed complaint.
9/18/96	7/18/96	Section E— Self-Determination; Section G— Impartiality; Section F— Professional Information	Complainant alleged that the mediator was not sensitive to her concerns. It was an “uphill battle.” Mediator appeared to side with the other party. Mediator misguided parties about the court’s procedures and gave incorrect information about the consequences of signing a praecipe.	Determined that if allegations were true, mediator had violated SOEs.			Determined that the mediator had instructed the parties inaccurately about court procedures, but did not show sufficient evidence of bias. Found no violation of the SOEs, but required mediator to take appropriate training classes and to work with mentor until the mediator improved the quality of his/her services. Executive Secretary would monitor future exit evaluations of that mediator.		Review Committee dismissed complaint, but recommended remediation.

Informal Complaint Received Date	Mediation Date	Virginia SOEs	Complaint Scenario	Mediator Complaint Panel Finding	Panel Appeal Outcome	Executive Secretary Finding Regarding Panel	Review Committee Finding	Committee Appeal Outcome	Final Resolution
12/1/96	8/19/96	Section D—Initiating Process; Section F—Legal Information; Section G—Impartiality; Section J—Agreement	Complainant expressed concern that the mediator provided legal advice regarding the division of assets and spousal support in a marriage of short duration. Showed bias and lacked objectivity by making statements which favored the other party's actions. Denigrated complainant's decision to change professions. Expressed concern that mediator arbitrated an issue which the party believed they addressed in mediation. The party also felt he did not have full opportunity to explore all issues.	Determined that if allegations were true, mediator had violated SOEs.			Found that the mediator's statements could be interpreted as legal advice and could affect the mediator's impartiality. The mediator should make the rules governing med-arb clearer to the parties at the beginning of the process. The Review Committee asked the mediator to develop a plan to address concerns and to provide DRS with exit evaluations.	Upheld Review Committee finding.	Review Committee found ethics violation.
6/1/97	1/14/97	Section E—Self-Determination; Section G—Impartiality	Alleged that mediator had been abusive and physically threatening. Stated that mediator had threatened to ensure that complainant would never get custody of his child. Also, threatened to prejudice GAL's view of complainant.	After reviewing mediator's response, MCP dismissed the complaint. Mediator said complainant was abusive to him and other party—he tried to pressure the other party to move the docket date. DRS could not follow-up with him. He moved, left no forwarding address, and did not appear in court.					MCP dismissed complaint.

MEDIATOR COMPLAINT SYSTEMS

Informal Complaint Received Date	Mediation Date	Virginia SOEs	Complaint Scenario	Mediator Complaint Panel Finding	Panel Appeal Outcome	Executive Secretary Finding Regarding Panel	Review Committee Finding	Committee Appeal Outcome	Final Resolution
1/23/01	1/17/01	Section E—Self-Determination; Section G—Impartiality	The party in co-mediation felt that one mediator provided his/her personal evaluation and opinions of the case involving custody and visitation issues. Complainant felt mediator did not hear her concerns and that the mediator supported her husband.	Found no violation of the SOEs. DRS suggested mediation between mediator and complainant to discuss concerns. Complainant did not want to participate in a facilitated meeting.	Appeal dismissed	Executive Secretary could not "as a matter of fact" find that the mediator violated either the SOEs or the Guidelines for Certification.			MCP found probable cause and met with the mediator and complainant. Mediator accepted sanctions: to restrict telephone conference call mediations except upon written authorization of all parties.
3/20/02	3/5/02	Section D—Initiating Process; Section E—Self-Determination; Section J—Agreement	Mediator allegedly failed to conduct separate orientation session. Provided legal advice and suggested parties had to decide issue of visitation that day. Mediator told parties to pretend paternity existed. Failed to advise parties they could consult with a lawyer. Mediator suggested solutions to the problems. Agreement obligated some parties not present at the mediation.	Suggested that mediator take an eight hour training course on screening for domestic violence. Also, suggested mediator co-mediate with a mentor in five family cases. Mediator would also provide exit evaluations to the Executive Secretary.					MCP dismissed complaint, but recommended remediation.

Informal Complaint Received Date	Mediation Date	Virginia SOEs	Complaint Scenario	Mediator Complaint Panel Finding	Panel Appeal Outcome	Executive Secretary Finding Regarding Panel	Review Committee Finding	Committee Appeal Outcome	Final Resolution
5/1/02	3/25/02	Section E—Self-Determination; Section G—Impartiality	Mediator allegedly exerted extreme pressure on the complainant to sign the agreement. Mediator showed some partiality towards complainant's wife. Mediation was too short. Mediator did not conduct the mediation in a professional manner.	Encouraged the mediator to be more sensitive in making statements to parties and encouraged him to gain greater awareness of parties' non-verbal communication.					MCP dismissed complaint but recommended remediation.
1/25/03	8/29/02	Section D—Initiating Process; Section E—Self-Determination	Mediator claimed that his co-mediator did not cover in the orientation session the rules governing confidentiality correctly. Also, expressed concern that his co-mediator had been coercive, judgmental, and lecturing.	Found no violation of the SOEs, but recommended DRS conduct a facilitated meeting between the co-mediators. A member of the MCP would also observe the mediator in two cases.					MCP dismissed complaint, but recommended remediation.

Appendix E: GODR Complaint Summary

Complaint Date	Alleged Violations	Ethics Committee Decision	Sanctions	Appeal to Commission
2002-1	<p>Following child support modification mediation, party alleged that mediator made demeaning and vulgar remarks to her.</p> <p>Remarks were allegedly insulting to both parties. Complaining party and her attorney indicated that the mediator's conduct did not affect the agreement the parties reached.</p>	<p>Following a full hearing with testimony from all parties, the Committee on Ethics found that the mediator had made the inappropriate remarks. The Committee concluded that the mediator's derogatory remarks gave the impression that the mediator had compromised his/her impartiality.</p> <p>Additionally, the Committee found that the mediator's conduct violated the integrity of the process. It also noted that humiliating remarks could intimidate a party and thus undermine self-determination through coercion.</p>	<p>Issued private letter of reprimand and published opinion without identifying information.</p>	None.
2002-2	<p>Following mediation in personal injury case, plaintiff's spouse alleged that mediator should have filed a mediator's report form indicating that insurer had conceded liability in the mediation. Complaining party also questioned mediator's impartiality and cited fact that insurer's representative complimented mediator at end of session and asked for mediator's business card.</p>	<p>Committee on Ethics did not convene a hearing. Based on information obtained from an investigation of the complaint, Committee concluded that the facts did not support the allegations and found no violation of the ethical standards.</p>	None.	None.

Complaint Date	Alleged Violations	Ethics Committee Decision	Sanctions	Appeal to Commission
2003-1	<p>Following a divorce mediation, the wife filed a complaint alleging that the mediator was too directive and told her the judge assigned to the case would never award what she was seeking. The mediator also talked with her in the hallway rather than hold a full caucus. She also complained that the mediator did not handle her situation appropriately after learning she was a victim of domestic violence. The complaining party also expressed concern that her attorney was not present throughout the mediation even though the mediator remained "on the clock" while they waited for her attorney to attend to another matter. Her attorney was present, however, at the time the parties wrote and signed the agreement. Nonetheless, she signed the agreement under pressure from her attorney and the mediator.</p>	<p>Committee on Ethics did not convene a hearing. On consideration of the complaint, the mediator's response, the investigative summary, and in view of all the circumstances, including representation by counsel, the Committee found no violation of the ethical standards.</p>	<p>None.</p>	<p>None.</p>

MEDIATOR COMPLAINT SYSTEMS

Complaint Date	Alleged Violations	Ethics Committee Decision	Sanctions	Appeal to Commission
2004-1	<p>Complaint arose from two small claims cases involving the purchase of dogs. The two mediations, with the same defendant, were scheduled back to back. Defendant alleged that the mediator should have prevented the two separate plaintiffs from communicating and exchanging documents between the mediation sessions. The exchange of information breached the confidentiality of both sessions. Complaining party also alleged that mediator improperly offered legal advice by commenting on how one party could improve his/her standard contract.</p>	<p>Committee on Ethics did not convene a hearing. On consideration of the complaint, the mediator's response, and the investigative summary, Committee found no violation of the ethical standards. Committee concluded that mediator's comments regarding the contract were more in the nature of general business advice than legal advice. Committee issued a private letter to mediator to suggest best practices in: offering opinions in joint session which could create the appearance of bias; declining to serve in two cases involving the same party and similar subject matter as this could create conduct bias against the repeat party; avoiding casual conversation with parties waiting to begin a mediation session when all parties were not yet present; and advising parties of the process for filing a complaint.</p>	None.	None.

Appendix F: Minnesota ADR Review Board Complaint Log
Through June 11, 2005

Complainant Initials and Date Received	Type of Case / Neutral	Allegations in Complaint	Resolution
AE-6/10/05	Family/Visitation Expeditor	Quality of the Process, Competence.	Board to review complaint on 8/5/05.
JV-6/8/05	Family/Parenting Time Expeditor	Quality of the Process, Confidentiality, Self- Determination.	Board to review complaint on 8/5/05.
JV-6/8/05	Family/Parenting Time Expeditor	Fees, Self-Determination, Confidentiality.	Board to review complaint on 8/5/05.
AL-5/15/05	Family/Parenting Time Expeditor	Fees, Impartiality, Quality of the Process, Self – Determination.	Dismissed without investigation for lack of a claim.
LH-3/22/05	Family/Visitation Expeditor	Impartiality, Conflicts of Interest, Competence, Confidentiality, Quality of the Process, Fees, Self- Determination.	Board voted to investigate 5/10/05. Investigation pending.
TF-1/31/05	Family	Quality of the Process.	Dismissed without investigation for lack of a claim.
AM-1/18/05	Family / Parenting Time Expeditor	Confidentiality, Fees, Quality of the Process.	Board voted to investigate 2/18/05. Investigation pending.
GM-12/30/04	Civil	Quality of the Process.	Dismissed without investigation for lack of claim.
JK-12/16/04	Civil/Estate Dispute	Confidentiality, Quality of the Process.	Dismissed without investigation and referred to Lawyers' Professional Responsibility Board.
LG-12/10/04	Family/Parenting Time Expeditor	Impartiality, Quality of the Process.	Board voted to investigate 1/14/05. Investigation pending.
JV-11/9/04	Family/Parenting Time Expeditor	Impartiality, Quality of the Process.	Dismissed without investigation for lack of claim.

MEDIATOR COMPLAINT SYSTEMS

Complainant Initials and Date Received	Type of Case / Neutral	Allegations in Complaint	Resolution
MF-10/4/04	Family / Parenting Consultant	Impartiality, Quality of the Process.	Board voted to investigate (e-mail vote October 2004). Board vote on findings and sanctions 1/14/05. Sanctioned for a violation of the Quality of the Process provision of the Code of Ethics. Notified the appointing court and court administrator of ethical lapse. File closed.
JR-9/15/04	Family / Parenting Time Expeditor	Confidentiality, Quality of the Process.	Board voted to investigate 9/17/04. Board vote on findings and sanctions 1/14/05. Sanctioned for a violation of the Confidentiality and Conflict of Interest provisions of the Code of Ethics. Notified the appointing court and court administrator of ethical lapse. File closed.
LR-9/3/04	Family / Parenting Time Expeditor	Impartiality.	Dismissed without investigation for lack of claim.
JV-8/14/04	Family / Parenting Time Expeditor	Quality of the Process, Overstepping Authority.	Board voted to investigate (e-mail vote September 2004). Board vote on findings and sanctions 10/15/04. Sanctioned for violation of Quality of the Process and Confidentiality provisions of the Code of Ethics. Imposed private reprimand. File closed.

Complainant Initials and Date Received	Type of Case / Neutral	Allegations in Complaint	Resolution
MK-8/12/04	Family / Parenting Consultant	Confidentiality, Quality of the Process.	Board voted to investigate (e-mail vote August 2004). Board vote on findings and sanctions 10/15/04. Sanctioned for violation of Quality of the Process and Confidentiality provisions of the Code of Ethics. Imposed private reprimand. File closed.
MF-4/15/04	Family / Parenting Consultant	Quality of the Process, Overstepping Authority.	Board voted to investigate 4/16/04. Board vote on findings and sanctions 6/16/04. Sanctioned for a violation of the Quality of the Process provision of the Code of Ethics. Required to attend training on domestic violence and ADR, as well as to establish a mentoring relationship with an established parenting consultant. Sanctions completed and file closed.
PB-3/24/04	Family / Parenting Consultant	Quality of the Process, Confidentiality, Conflict of Interest.	Board voted to investigate 4/16/04. Based on investigation, Board voted to dismiss 6/16/04. File closed.
LC-1/19/04	Family / Parenting Time Expeditor	Quality of the Process, Confidentiality, Conflict of Interest.	Board voted to investigate 2/20/04. Board voted on findings and sanctions 4/16/04. Sanctions appealed by neutral. Appeal hearing 9/14/04. Findings from appeal October 2004: sanctioned for a violation of the Confidentiality provisions of the Code of Ethics. Required Parenting Time Expeditor Agreement to more clearly set out confidentiality expectations for the parties. File closed.

MEDIATOR COMPLAINT SYSTEMS

Complainant Initials and Date Received	Type of Case / Neutral	Allegations in Complaint	Resolution
AM-1/12/04	Family / Parenting Time Expeditor	Quality of the Process, Confidentiality.	Board voted to investigate 2/20/04. Board vote on findings and sanctions 4/16/04. Sanctioned for violation of Confidentiality provision. Required to change policy on acceptance of parenting time expeditor appointments and to train on new policy. Sanction completed April 2004. File closed.
LB-12/19/03	Family / Parenting Time Expeditor	Quality of the Process, Confidentiality, Conflict of Interest.	Board voted to investigate 2/20/04. Board voted on findings and sanctions 4/16/04. Sanctions appealed by neutral. Appeal hearing 9/14/04. Findings from appeal October 2004: sanctioned for a violation of the Confidentiality provision of the Code of Ethics. Required Parenting Time Expeditor Agreement to more clearly set out confidentiality expectations for the parties. File closed.
SZ-9/4/03	Family / Post- Decree Mediator	Conflict of Interest.	Board voted to investigate 9/12/03. Based on investigation, Board voted to dismiss 12/12/03. File closed.
KC-2/10/03	Family / Post- Decree Financial Neutral	Conflict of Interest, Impartiality.	Board voted to investigate 5/16/03. Based on investigation, Board voted to dismiss 9/12/03. File closed.
NJ-3/22/02	Family / Post- Decree Mediator	Conflict of Interest.	Dismissed without investigation for lack of claim.
AD-10/23/01	Civil / Arbitration	Quality of the Process.	Dismissed without investigation for lack of claim.

Complainant Initials and Date Received	Type of Case / Neutral	Allegations in Complaint	Resolution
AF-9/4/01	Family/ Parenting Time Consultant	Conflict of Interest, Quality of the Process.	No record of resolution.
TM-7/31/01	Civil/ Mediator	Quality of the Process, Self Determination.	No record of resolution.
MT-5/01/01	Family/ Post Decree Mediator	Impartiality, Conflicts of Interest, Competence, Confidentiality, Quality of the Process, Advertising & Solicitation, Fees, Self- Determination.	Board voted to investigate 9/21/01. Based on investigation, Board voted to dismiss 12/21/01. File closed.
JH-7/11/01	Unknown	Unknown.	Requested complainant to file formal complaint. None filed.
BF-10/30/00	Family/ Post Decree Mediator	Impartiality, Quality of the Process, Self-Determination.	Board voted to investigate 11/17/00. Based on investigation, Board voted to dismiss 3/27/01. File closed.
SB-1/05/00	Civil/ Summary Jury	Complaint about the ADR Process. Non-neutral matter.	Dismissed without investigation for lack of jurisdiction.
KK-1/21/99	Family/ Parenting Time Consultant	Quality of the Process, Self- Determination, Competence.	No record of resolution.
SH-3/6/98	Family/ Parenting Time Consultant	Quality of the Process, Competence.	Dismissed because Code of Ethics not in effect at time. Sent letter asking permission to use information for training 4/28/98.

MEDIATOR COMPLAINT SYSTEMS

Appendix G: Maine CADRES Complaint Log

Date	Case Type	Nature of Complaint	Action(s)
Aug. '97	Superior Court	Terms of agreement not written clearly.	Observation and supervision.
Nov. '97	Family	Biased / not impartial.	Observation and supervision. Required to obtain additional training and observe other mediators.
Aug. '98	Family	Conducting counseling, not mediation. Does not work well with attorneys.	Observation and supervision.
Dec. '98	Family	Problem with child support calculation.	Observation and supervision.
Dec. '98	Family	Lacked focus in mediation. Offered solutions.	Discussion. Mediator resigned from roster.
Dec. '98	Family	Competence to mediate.	Observation and supervision (multiple sessions).
Jan. '99	Family	Ineffective style of mediation.	Observation and supervision. Required to obtain additional training and observe other mediators.
Jan. '99	Family	Gave legal / tax advice.	Observation and supervision.
Jan. '99	Family	Ineffective style of mediation.	Observation and supervision. Required to obtain additional training and observe other mediators.
Sept. '99	Superior Court	Rude to litigant.	Observation and supervision. Mediator resigned from roster.
Nov. '99	Family	Ineffective style of mediation.	Observation and supervision. Changed court assignments.

Date	Case Type	Nature of Complaint	Action(s)
Nov. '99	Family	Lacked familiarity with legal procedure.	Discussion.
Apr. '00	Family	Offered opinion / gave legal advice.	Discussion.
July '00	Family	Not impartial.	Discussion. Meeting with complainant.
Feb. '02	Family	Insensitive to domestic violence (DV) issues. Confrontational.	Observation and supervision (multiple sessions).
Apr. '02	Family	Not impartial. Arrogant.	Observation and supervision.
Apr. '02	Family	Insensitive to DV issues. Offered own opinion. Recommended settlement.	Observation and supervision. Mediator resigned from roster.
June '02	Family	Failed to appear. Competence to mediate.	Observation and supervision. Mediator resigned from roster.
Sept. '02	Superior Court	Rude, controlling manner.	Discussion.
Feb. '03	Family	Rude, unprofessional manner.	Observation and supervision.
Sept. '03	Family	Rude. Would not mediate with party who had given power of attorney.	Observation and supervision.
Oct. '03	Family	Not neutral.	Observation and supervision.
June '04	Family	Recommended settlement.	Observation and supervision.
July '04	Family	Asked degrading questions. Pressed for agreement. Poor appearance.	Discussion. Mediator voluntarily inactive.
Aug. '04	Family	Mismanaged mediation in light of parenting agreement (PA) order.	Meeting. Observation and supervision. Follow-up meeting.

MEDIATOR COMPLAINT SYSTEMS

Date	Case Type	Nature of Complaint	Action(s)
Nov. '04	Family	Rude to court clerk.	Discussion.
Dec. '04	Family	Not neutral. Ineffective style of mediation.	Discussion. Observation pending.
Jan. '05	Family	Failed to write points of agreement. Left prematurely.	Observation and supervision.
Feb. '05	Family	Not neutral. Pressed for agreement.	Discussion. Observation pending.
Feb. '05	Family	Ineffective style of mediation. Ineffective at working with attorneys.	Discussion. Observation pending.
March '05	Family	Insensitive to DV issues. Mismanaged mediation in light of PA order.	Observation and supervision.
July '05	Family	Biased. Steered agreement.	Letter sent. Observation pending.

Appendix H: North Carolina DR Commission Complaint Log

Complaint Source	Date	Alleged Violations	Disposition	Description of Outcome
Parties filed complaint letter.	1996	Favored the defendants and browbeat them.	Dismissed.	
Plaintiffs sued mediator in federal court.	1996	General complaint about "actions done and omissions made in his capacity as a mediator." Senior Resident Superior Court Judge had recently appointed mediator. Mediator had only contacted complainants to ask them about scheduling. The Dispute Resolution Commission (DRC) approached legal counsel for the Administrative Office of the Courts (AOC) who, in turn, persuaded the Attorney General's office to provide counsel for the mediator under the immunity provisions in N.C.G.S. § 7A-38.1. Complainants also named in the suit a superior court judge, a clerk, a district attorney, an assistant district attorney, various police officers, the City of Charlotte, the Charlotte City Council, and several others as defendants.	Dismissed.	
Non-party participant filed formal complaint.	2000	Judge assigned the mediation to a highly respected mediator he had asked to be in the court room during a hearing in this highly contentious, long-running case. The judge asked the mediator to conduct the mediation at that time. Complainant alleged that the mediator failed to give her and her sons adequate time to prepare for mediation. Mediator blocked her from participating in a mediation as a non-party participant. Mediator failed to explain the mediation process as required by Rule 6, did not reduce the agreement to writing at the mediation, and did not have the parties sign it at the conference as required by Rule 4.	Dismissed.	Following an investigation, DRC staff, in consultation with the DRC Chair, dismissed the complaint. Complainant requested an appeal. The DRC Chair then appointed a three-member panel that reviewed the complaint. The panel found no merit to the complaint. Affirmed.

MEDIATOR COMPLAINT SYSTEMS

Complaint Source	Date	Alleged Violations	Disposition	Description of Outcome
First of two complaints filed in two different cases involving the same certified family financial mediator. Filed by wife-party.	2003	The complaining wife alleged that the mediator had conducted a mediation for her and her husband while at the same time representing her husband.	Dismissed.	See entry immediately below.
Second of two complaints filed in two different cases involving the same certified family financial mediator. Filed by an attorney who represented the husband-party.	2003	Complaining attorney alleged that mediator represented both husband and wife as an attorney when he mediated the case for the parties.	Sanctions imposed.	The panel found that the mediator acted both as the mediator and as an attorney for the couple. Required the mediator to observe two family mediations and complete at least six hours of family mediation continuing education. Also removed mediator from the roster until she complied with sanctions. The mediator complied, but the bar later disbarred her and the DR Commission removed her from the roster.
Party filed formal complaint.	2003	Complainant alleged that mediator was improperly assigned to mediate the case. Did not cap his fee at \$125/hour per MSC Rule 7. Delayed scheduling the mediation. Sought to bully the complaining party.	Dismissed.	Following an investigation, the DRC Chair dismissed the complaint.
Parties, a daughter and her elderly mother, filed formal complaint.	2003	Acted improperly in allowing a document to be considered at the mediation. Showed bias against the complainants. Failed to give them breaks and "sustenance" during a mediation conducted from 10:00 a.m. until 5:30 p.m. These failures caused the 80 year old mother physical and emotional detriment. Made errors in drafting the mediation agreement.	Dismissed.	Following an investigation, the DRC Chair dismissed the complaint.

Complaint Source	Date	Alleged Violations	Disposition	Description of Outcome
Party filed a grievance with the state bar.	2003	The bar notified the DRC of the complaint and continued to investigate it. Plaintiff alleged that mediated agreement provided for the defendant to pay a sum of money. When he did not make the agreed payment, the plaintiff filed a complaint against the mediator. The state bar found no probable cause.	Given the state bar's determination, the DRC did not launch a separate investigation.	
Party filed formal complaint.	2004	Failed to timely schedule mediation and so it never occurred.	Warning issued.	DRC also drafted Advisory Opinion 08-05 admonishing mediators to follow scheduling practices that conform to the rules.
Parties filed formal complaint.	2004	Charged too high an hourly rate and overstated in his billings the time involved in the mediation session.	Dismissed.	Following an extensive investigation and review of the mediator's billing records, dismissed complaint.
Party filed formal complaint.	2004	Failed to respond to party's written request that he disclose information about the nature of his relationships with opposing attorneys. Pressured the complainant to settle and forced him to make offers. Expressed legal opinions. Failed to exercise due diligence to settle the case. Failed to distribute an evaluation form.	Letter of Caution issued.	Following an investigation and interview of the attorneys involved in the mediation, the DRC issued a letter of caution to mediator, reminding him of his duty to provide parties with an evaluation form. The DRC found no merit to the additional claims.
Party sent e-mails and made phone calls. Never filed a formal complaint.	2005	Alleged sexual misconduct and breaches of confidentiality on the part of a certified mediator working outside the court context. AOC staff became involved as did the DRC's Standards and Discipline Committee. Complainant did not file a formal complaint with the DRC. Later, notified the DRC in writing that he would not pursue matter. Later, complainant asserted that the mediator had coerced him into withdrawing his complaint.	DRC told complainant to file formal complaint.	

MEDIATOR COMPLAINT SYSTEMS

Appendix I: Arkansas ADR Commission Complaint Log

Complaint Date	Disposition Date	Case Number	Summary	Disposition
1/21/2003	6/16/2003	2003-02	Director of Access and Visitation Program initiated investigation. Mediator co-mediated a visitation case with an unauthorized mediator in violation of program policy. The mediator had previously been cautioned on this specific matter.	The ADR Commission planned to reconsider the matter if the mediator chose to apply for certification under the new roster system. The mediator did not apply for certification.
2/4/2003	8/13/2003	2003-03	Participant alleged that the mediator was rude and biased.	Complaint determined to be unfounded. Dismissed.
5/27/2003	8/13/2003	2003-04	Attorney representing a party to the mediation asked that the mediator be disciplined for telling his client that the mediator was unable to contact the attorney by phone prior to the mediation.	Complaint determined to be unfounded. Dismissed.
7/20/2004	3/2/2005	2004-02	Party alleging that the mediator had mediated her divorce settlement and then acted as her husband's attorney in the same matter.	Complaint determined to be unfounded. Dismissed.
8/23/2005	1/9/2006	2005-01	Attorney representing a party in the mediation alleged that the mediator had violated confidentiality by reporting to the court by letter communications made during the mediation.	The matter was resolved informally. A letter of caution was placed in the mediator's file.

